TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 261

CITIZENS SAVINGS BANK AND TRUST COMPANY,
APPELLANT,

vs.

JOSEPH F. SEXTON, AS EXECUTOR OF THE ESTATE OF QUINCY D. CHAPMAN, DECEASED, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

FILED MARCH 27, 1923.

(29,483)

(29,483)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 933.

CITIZENS SAVINGS BANK AND TRUST COMPANY, APPELLANT,

vs.

JOSEPH F. SEXTON, AS EXECUTOR OF THE ESTATE OF QUINCY D. CHAPMAN, DECEASED, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 21, 1923.

1 IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 3980.

CITIZENS SAVINGS BANK & TRUST COMPANY, a Corporation, Complainant,

vs.

JOSEPH F. SEXTON, as Executor of the Estate of Quincy D. Chapman, Deceased; Millard F. Chapman, and Mrs. H. Ferry, Defendants.

Names and Addresses of Solicitors of Record.

L. H. Brown, Solicitor for Complainant, 801 Old National Bank Bldg., Spokane, Washington.

Danson, Williams & Danson, Solicitors for Defendant, 901 Paulsen Building, Spokane, Washington.

2 In the District Court of the United States for the Eastern District of Washington Northern Division.

[Title omitted.]

Bill of Complaint.

[Filed Apr. 15, 1922.]

To the Hon. Frank H. Rudkin, Judge of the District Court of the United States for the Eastern District of Washington, Eastern Division:

The Citizens Savings Bank & Trust Company, a corporation, duly organized by and existing under the laws of the State of Vermont, and having its principal place of business at St. Johnsbury in said State, and a citizen of said state, humbly complains against Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, said Joseph F. Sexton being a citizen of the State of Washington, and residing in Spokane County of said State; and against Millard F. Chapman, a citizen of the State of Michigan and residing in Kalamazoo County, of that State, and against Mrs. H. Ferry, a citizen of the State of Ohio, and residing at Kingsville in Ashtabula County of said State.

And your complainant therefore complains and says:

1. That at all times herein mentioned complainant, Citizens Savings Bank & Trust Company, was and is a corporation, organ-

ized and existing under the laws of the State of Vermont, and having its principal office at St. Johnsbury, Vermont, and has paid all license fees to and complied with all regulations of the state of Vermont, with respect to corporations organized therein, and that its charter and articles are in full force and effect.

3 2. That on the 1st day of September, 1908, at Spokane, in the State of Washington, James W. Hays and Lillie Hays, his wife, for a valuable consideration to them paid, made, executed and delivered to M. L. Bevis, their certain principal first mortgage note in the sum of Five Thousand ($5,000) Dollars, together with certain interest coupons attached thereto.

3. That thereafter, and on to-wit the third day of September, 1908, and in order to secure the payment of the note set forth in the preceding paragraph hereof, said James W. Hays and Lillie G. Hays, his wife, for a valuable consideration to them paid, duly executed and delivered to said M. L. Bevis, their certain real estate mortgage, dated September 1, 1908, by which they did grant, bargain sell and convey to said M. L. Bevis, the following described real estate, of which they were then the owners and in possession, situated in Douglas (now Grant) County, Washington, and which said real estate was and is within the above entitled judicial district of this Court, to-wit:

"All of Section Five (5) in Township Nineteen (19) North Range Twenty-six (26) E. W. M.

That said mortgage was duly acknowledged and thereafter and on to-wit the 9th day of September, 1908, recorded in the office of the auditor of said Douglas County, Washington, in Book "U" of Mortgages, page 530.

4. That thereafter and on or about to-wit the — day of ——, 1908, said M. L. Bevis, for a valuable consideration duly endorsed, transferred and assigned said promissory note and the said mortgage to Citizens Savings Bank & Trust Company, complainant herein, which said assignment of mortgage was thereafter recorded in the office of the Auditor of Grant County, Washington, in Book —, page —, and said complainant has at all times since been and now is the owner and holder of said note and mortgage and entitled to all sums due or to become due thereon.

5. That thereafter and on, to-wit the 11th day of October, 1911, said James W. Hays, and Lillie G. Hays, his wife, for a

4 valuable consideration, made, executed and delivered to said Quincy D. Chapman, a warranty deed to an undivided one-half interest in and to said lands subject to complainant's said mortgage, for Five Thousand Dollars, said deed being by said Chapman filed for record and recorded in Book 6, page 494, records of Grant County, Washington and that as part of the consideration for said transfer, said Quincy D. Chapman assumed and agreed to pay one-half of complainant's said mortgage.

6. That thereafter and on to-wit the 17th day of August, 1917, said James W. Hays, and Lillie G. Hays, his wife, for a valuable consideration, made, executed and delivered to said Quincy D.

Chapman a warranty deed, covering all of the interest of said Hays and wife, in and to said lands, by the terms of which deed, said Quincy D. Chapman assumed and agreed to pay the said $5,000.00 mortgage heretofore described together with all interest and accumulations thereon, and which said deed said Quincy D. Chapman caused to be filed and recorded in the office of the Auditor of Grant County, Washington, in Book 19 of Deeds, at page 474, on September 7, 1917.

7. That said James W. Hays and Lillie G. Hays, his wife, have ceased to have any interest in the said above described real estate or any part thereof.

8. That thereafter and on to-wit the 3rd day of October, 1917, said Quincy D. Chapman for a valuable consideration made and entered into a written agreement with this complainant by the terms of which said mortgage was extended to January 1st, 1923, and by the terms of which said Quincy D. Chapman agreed to pay the same and the whole thereof, together with all accumulations of interest thereon (a copy of which instrument of extension is hereto attached, marked "Exhibit A" and made a part of this Bill of Complaint).

9. That by the terms of said mortgage and said extension agreement, it was provided that in the event of default in the payment of the principal or interest of said note and mortgage, after the same should become due and payable, the holder thereof might declare the whole, both principal and interest, due and payable without further notice and might immediately bring suit to foreclose said mortgage.

10. That the said Quincy D. Chapman died on or about the 21st day of December, 1921, testate, and by the terms of his will, defendants Millard F. Chapman and Mrs. H. Ferry, are sole devisees of said Quincy D. Chapman, deceased, and by virtue thereof, have or claim to have some right, title, estate, lien or equity in or to the property described in this Bill of Complaint, and are necessary and indispensible parties defendant to this action.

11. That thereafter and about the — day of January, 1922, said will was admitted to probate in the Superior Court of Spokane County, in the State of Washington, and Joseph F. Sexton was by said Court appointed as executor thereof and duly qualified as such and at all times has been and now is the duly appointed, qualified and acting executor of the estate of said Quincy L. Chapman, deceased.

12. That thereafter and on, to-wit, February 25th, 1922, complainant herein duly filed and served its claim as a creditor of the estate of said Quincy D. Chapman (as provided by the laws of the State of Washington), in the sum of Five Thousand Four Hundred Twenty-nine Dollars and ninety cents ($5,429.90), and then and there and by reason of the fact that said mortgage and note was then in default for payment of interest, declared the whole of the same, both principal and interest, due and payable. That thereafter, and on to-wit, the 22nd day of March, 1922, said Joseph F. Sexton, executor as aforesaid, caused the said claim to be disallowed.

13. That said note and mortgage provided for the allowance of a reasonable attorney's fee to complainant in the event of foreclosure and that the sum of Six Hundred ($600) Dollars is a reasonable sum to be allowed therefor.

14. That said mortgage contains a provision that in the event said premises do not sell for sufficient to pay the same, together with accumulations of interest and costs, that complainant herein might have and recover a deficiency judgment therefor.

15. That said mortgage provides that the purchaser at the
6 foreclosure sale held thereunder shall be entitled to the possession of said lands during the period of redemption.

16. That said note and mortgage provides that overdue interest and principal shall bear interest at the rate of 10% per annum.

17. That no other action or proceeding has been commenced or is now pending for the collection of said note or foreclosure of said mortgage.

18. That the above named defendants and each of them have or claim to have some right, title, interest, equity or estate in and to the above described premises or some part thereof, but complainant alleges that whatever right, title, estate, lien, interest or equity said defendants or any of them have in or to said premises the same is inferior, subordinate and subsequent to complainant's rights by virtue of said mortgage.

19. That defendants have failed, neglected and refused to pay any part of said principal note, have also failed to pay the interest due thereon January 1st, 1922, or any part thereof and by reason thereof, there is now due and owing to this complainant thereon, from the Estate of said Quincy D. Chapman, the sum of Five Thousand Dollars, with interest thereon from January 1st, 1922, at the rate of seven per cent per annum; Three Hundred Fifty Dollars with interest thereon from January 1st, 1922, at the rate of ten per cent per annum, together with complainant's attorney's fees, costs and disbursements herein.

Wherefore, This complainant prays judgment against defendant Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, in the following sums: The sum of Five Thousand ($5,000) Dollars, with interest thereon from January 1, 1922, at the rate of seven per cent per annum, Three Hundred Fifty ($350) Dollars, with interest thereon from January 1st, 1922, at the rate of ten per cent per annum, the sum of Six Hundred Dollars, attorney's fees and complainant's costs and disbursements in this action.

7 Complainant further prays that each and all of the above sums be declared a good and valid lien against the premises above described, under and by virtue of said mortgage; that said mortgage be foreclosed and the premises covered thereby ordered sold in the manner provided by law, in accordance with the practise of this Court, the proceeds of said sale to be applied to the payment of (1) the costs and disbursements herein, including costs of sale, (2) to the amount adjudged to be due complainant under said mortgage, including interest and attorney's fees, and in the event the proceeds

of said sale be insufficient to fully pay said judgment in the amount so found due complainant herein, that complainant have personal judgment against defendant, Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, for any sum then remaining unpaid, and that said executor be directed to pay said judgment out of the assets of the estate of the said Quincy B. Chapman, deceased, all in the manner provided by law.

That by said foreclosure and sale all the right, title and interest of defendants in this action in and to the premises herein described be foreclosed and excluded and each and all of said defendants and all persons claiming under them or any of them, be forever barred, foreclosed, and enjoined from claiming, asserting or exercising any right, title, interest, estate, lien or equity in and to said premises or any part thereof, save the right of redemption provided by law.

That the purchaser at said sale be entitled to possession of said property upon production of the Certificate of Sale therefor from the officer holding such sale.

And for such other and further relief as to the Court may seem equitable, legal and warranted by the facts herein set forth. L. H. Brown, Attorney of Record for Complainant Herein. Lawrence H. Brown, Attorney for Complainant, Post Office Address 801 Old National Bank Bldg., Spokane, Washington.

[File endorsement omitted.]

8

Exhibit to Bill of Complaint.

This Agreement made and entered into this 19th day of September 1917, by and between J. W. Hays, and Lillie G. Hays, his wife, parties of the first part, Q. D. Chapman, a widower, prior to the year 1910, part of the second part, Citizens Savings Bank and Trust Company, party of the third part, Witnesseth as follows, to-wit:

That whereas the first parties hereto did on the 1st day of September, 1908, execute and deliver a certain mortgage of that date in favor of M. L. Bevis, covering all of Section Five (5), Township nineteen (19) North Range Twenty-six (26) E. W. M. in Grant County, Washington, to secure the payment of a certain promissory note executed by the first parties hereto of even date with said mortgage in favor of said M. L. Bevis.

And whereas said note and mortgage was duly endorsed and assigned to the Citizens Savings Bank and Trust Company, third parties hereto on the 16th day of September, 1908, by the said M. L. Bevis, which assignment was duly recorded on the 18th day of September, 1908, in Book 28 of Mortgages, page 139, in the office of County Records for Douglas County, Washington, no Grant County, Washington, transcribed in book 1, of Mortgages, page 68 of Grant County Records.

And whereas said first parties hereto did on the 11th day of October, 1911, transfer by good and sufficient warranty deed to Q. D. Chapman, the second party hereto, an undivided one-half interest in and to said lands subject to the said mortgage.

And whereas, the first parties hereto did on the 17th day of August, 1911, transfer and convey by good and sufficient warranty deed, subject to said mortgage, to said Q. D. Chapman, the other undivided one-half interest in and to the premises above described.

And whereas, the above described mortgage will become due and payable on January 1st, 1918.

And whereas, the said second party hereto is desirous of having the time of payment of said note and mortgage extended from January 1st, 1918, to January 1st, 1923, and each and all of the parties hereto in consideration of the foregoing premises and the mutual covenants and obligations each to the other, it is agreed that the said time of said note and mortgage be and the same is hereby extended to January 1st, 1923, and that the said J. W. Hays and Lillie G. Hays, his wife, remain liable and bound by the said note and mortgage in all the respective terms and provisions, and that the first and second parties and each of them hereto, are hereby given the right and privilege of paying off *on* account of the principal of said note and mortgage, the sum of Five Hundred ($500) Dollars, or any sum in excess thereof at any interest paying date, and it is further agreed by all the parties hereto that all the other terms, provisions and conditions of the said note and mortgage in and all hereto shall be binding and obligatory upon the respective parties hereto, and upon the said land described herein, and the said mortgage shall remain a lien upon said lands in all particulars and be of the same force and effect as if the time of payment of said note and mortgage were originally made payable on the 1st day of January, 1923, instead of on the 1st day of January, 1918, and that each provision of said note and mortgage and the right to foreclose and enforce payment thereof in default of payment of interest or default in the compliance with the provisions of said mortgage, shall be and remain in full force and effect and uneffected and unimpaired by this extension.

In witness whereof the parties hereto have hereby caused this instrument to be executed in triplicate the day and year first above written. J. W. Hays, Lillie G. Hays, First Parties. Q. D. Chapman, Second Party. Citizens Savings Bank & Trust Company, by A. J. Bailey, President. John T. Ritchie, Secy., Third Party. (Corporate Seal.)

9 State of Washington,
County of Spokane, ss:

I, A. E. Gallagher, a Notary Public in and for the State of Washington, do hereby certify that on this 3d day of October, 1917, personally appeared before me, J. W. Hays, and Lillie G. Hays, his wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 2d day of October, A. D. 1917. A. E. Gallagher, Notary Public in and for the State of Washington, Residing at Spokane, Wash. [Seal.]

STATE OF WASHINGTON,
County of Spokane, ss:

I, A. E. Gallagher, a Notary Public in and for the State of Washington, do hereby certify that on this 3d day of October, A. D. 1917, personally appeared before me Q. D. Chapman, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 3d day of October, 1917. A. E. Gallagher, Notary Public in and for the State of Washington, Residing at Spokane, Washington. [Seal.]

STATE OF VERMONT,
County of Caledonia, ss:

On this 24th day of September, A. D. 1917, before me personally appeared A. L. Bailey, to me known to be the President, and John T. Ritchie, to me known to be the Secretary of the Corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of the said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written. Donald McGregor, Notary Public in and for the State of Vermont, Residing at St. Johnsbury, Vermont. [Seal.] My commission expires January 31, 1919.

10 In the District Court of the United States for the Eastern District of Washington, Northern Division.

[Title omitted.]

Answer of Joseph F. Sexton.

[Filed May 4, 1922.]

Now comes Joseph F. Sexton, executor of the Estate of Quincy D. Chapman, deceased, and for Answer to the Bill of Complaint:

1. That as to the allegations contained in paragraph one of the Bill, that the complainant was or is a corporation, or is organized or existing under the laws of the State of Vermont, or has paid any license fees or complied with any regulations of the State of Vermont with respect to corporations organized therein, or that its

charter and articles are in full force and effect, this defendant has no knowledge or belief as to any of these allegations, and denies the same.

2. That as to the allegations contained in paragraph four of the Bill, that on the — day of ——, 1908, or at any other time, M. L. Bevis for a valuable or any consideration, endorsed, transferred or assigned the said promissory note or the said mortgage to complainant, or that said alleged assignment was recorded, or that complainant at any time has been or is now the owner or holder of said
11 note or mortgage, or is entitled to any sums due or to become due thereon, this defendant has no knowledge or information sufficient to form a belief, and denies each and every of said allegations.

3. That as to paragraph five of said Bill, this defendant denies that said James W. Hays and Lillie G. Hays on October 11, 1911, or at any other time, made any conveyance to said Quincy D. Chapman of an undivided one-half interest in said lands, or any other interest, and as a consideration for said transfer said Quincy D. Chapman assumed or agreed to pay one-half or any other part of said mortgage indebtedness; but defendant admits that on or about October 11, 1911, said James W. Hays and Lillie G. Hays executed and delivered to Quincy D. Chapman a deed for an undivided one-half interest in said real estate, in consideration of the payment by Quincy D. Chapman of the sum of $10,309.00, and under an agreement whereby said James W. Hays guaranteed to said Quincy D. Chapman that he should sustain no loss through the purchase of said property and the payment of the said consideration; that said Quincy D. Chapman has sustained the loss of his entire investment with interest thereon from said October 11, 1911, and said real estate is not worth any sum in excess of the mortgage indebtedness, and this defendant has elected to recover from said James W. Hays the loss sustained by him, to-wit, the sum of $10,309.00 with interest from October 11, 1911, at the legal rate.

4. That as to paragraph six of the Bill, this defendant denies that on August 17, 1917, or at any other time, said James W. Hays and Lillie G. Hays, his wife, or either of them, for a valuable consideration, or at all, made, executed or delivered to Quincy D. Chapman a warranty deed covering all or any of the interest of said Hays and wife in any of said lands, and denies that by the terms of any such deed said Quincy D. Chapman assumed or agreed to pay the said $5,000.00 mortgage with interest and accumulations thereon, or any part of any such indebtedness, and denies that said Quincy D. Chapman caused any such deed to be filed or recorded at any time;
12 but this defendant admits that on or about August 17, 1917, said James W. Hays and Lillie G. Hays executed an instrument which in form was a warranty deed, for an undivided one-half interest in said real estate and in favor of said Quincy D. Chapman, and caused said deed to be placed of record in the office of the auditor of Grant County, Washington, but this defendant alleges that said deed was in fact a mortgage given as security for indebtedness due

from said James W. Hays and Lillie G. Hays, to said Quincy D. Chapman, and not for the purpose of passing any title to said Quincy D. Chapman.

5. That as to paragraph seven of the Bill, this defendant denies that said James W. Hays and Lillie G. Hays, his wife, have ceased to have any interest in said real estate.

6. That as to paragraph eight of the Bill, this defendant denies that on October 3, 1917, or at any time, said Quincy D. Chapman made or entered into any written or other agreement with complainant, by the terms of which said Quincy D. Chapman agreed to pay the said mortgage indebtedness or any part thereof, or to pay any indebtedness of any nature or kind, or to pay any accumulation of interest thereon, but admits the said Quincy D. Chapman did sign a document as shown by exhibit "A" attached to the Bill.

7. That as to paragraph twelve of the Bill, this defendant admits that complainant on February 25, 1922, served on this defendant its purported claim against the estate of said Quincy D. Chapman, deceased, in the sum of $5,429.90; and that on March 22, 1922, this defendant rejected and disallowed said claim, but denies each and every other allegation in said paragraph contained.

8. That as to paragraph thirteen of the Bill, this defendant denies that the sum of $500.00 or any other sum is a reasonable attorney's fee to be allowed.

9. That as to paragraph nineteen of the Bill, this defendant denies that there is now due or owing to complainant from the estate of Quincy D. Chapman the sum of $5,000.00 with interest from January 1, 1922, at 7% per annum; $350.00 with interest
13 from January 1, 1922, at 10% per annum, together with complainant's attorney's fees, costs and disbursements herein, and denies that any of said sums are due or owing from said estate.

Having thus made a full answer to all matters and things contained in the Bill this defendant prays that the Bill be dismissed so far as the complainant seeks to recover any money judgment against this defendant, and for his costs in this behalf incurred.

R. J. Danson, Jas. A. Williams, Robert W. Danson, Solicitors for said Defendant.

[File endorsement omitted.]

11 In the District Court of the United States for the Eastern District of Washington, Northern Division.

[Title omitted.]

Amended Bill of Complaint.

[Filed Aug. 21, 1922.]

To the Hon. Frank H. Ruskin, Judge of the District Court of the District Court of the United States for the Eastern District of Washington, Eastern Division:

The Citizens Savings Bank & Trust Company, a corporation duly organized by and existing under the laws of the State of Vermont, and having its principal place of business at St. Johnsbury in said State, and a citizen of said State, humbly complains against Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, said Joseph F. Sexton being a citizen of the State of Washington, and residing in Spokane County of said State, and against Millard F. Chapman, a citizen of the State of Michigan and residing in Kalamazoo County of that state, and against Mrs. H. Ferry, a citizen of the State of Ohio, and residing at Kingsville in Ashtabula County of said State.

And your complainant therefore complains and says:

1. That at all times herein mentioned complainant, Citizens Savings Bank & Trust Company, was and is a corporation, organized and existing under the laws of the State of Vermont, and having its principle office at St. Johnsbury, Vermont, and has paid all license fees to and complied with all regulations of the State of Vermont, with respect to corporations organized therein, and that its charter and articles are in full force and effect.

15 2. That on the 3d day of September, 1908, at Spokane, in the State of Washington, James W. Hays and Lillie G. Hays, his wife, for a valuable consideration to them to be paid, and which was thereafter paid, made, executed and delivered to M. L. Bevis their certain principal first mortgage note, dated September 1st 1908, in the sum of Five Thousand ($5,000) Dollars, together with certain interest coupons attached thereto.

3. That thereafter, and on to-wit the third day of September, 1908, and in order to secure the payment of the note set forth in the preceding paragraph hereof, said James W. Hays and Lillie F. Hays, his wife, for a valuable consideration to them to be paid, and which was thereafter paid, duly executed and delivered to said M. L. Bevis, their certain real estate mortgage, dated September 1, 1908, by which they did grant, bargain, sell and convey to said M. L. Bevis, the following described real estate, of which they were then the owners and in possession situated in Douglas (now Grant) County, Washington, and which said real estate was and is within the above entitled judicial district of this Court, to-wit:

All of section Five (5) in Township Nineteen (19) North Range Twenty-six (26) E. W. M.

That said mortgage was on September 3d, 1908, duly acknowledged and thereafter and on to-wit the 9th day of September, 1908, recorded in the office of the auditor of said Douglas County, Washington, in Book "U" of Mortgages, page 530."

4. That thereafter and on to-wit the 4th day of September, 1908, said M. L. Bevis duly endorsed and transferred said promissory note by endorsement of same "without recourse," and delivered the same to Citizens Savings Bank and Trust Company, the complainant herein, and thereafter and on, to-wit, September 16th, 1908, duly assigned said mortgage to said Citizens Savings Bank and Trust Company, the complainant herein, which said assignment of mortgage was thereafter and on, to-wit September 18, 1908, filed for record in the office of the Auditor of Douglas County (now Grant County), Washington.

That complainant herein, Citizens Savings Bank & Trust Company, at all times since the making of such note and mort-
16 gage, has been and now is the owner and holder thereof, and entitled to all sums which became due and are due thereon; That the payee and transferrer of said note and mortgagee and transferror of said mortgage, to-wit, M. L. Bevis, at all times herein mentioned was and still is a citizen of the State of Washington, residing in Spokane County, in said State; That he, the said M. L. Bevis, was, during the entire months of August and September, 1908, and for a number of years prior thereto, a member of the firm of Bevis Bros., a co-partnership, and the active managing head thereof, engaged in the mortgage loan brokerage business at Spokane, Washington; That on September 3d, 1908, said James W. Hays and Wife, made written application to said M. L. Bevis and Bevis Bros. for a loan of Five Thousand ($5,000) Dollars on the lands above described, and in such application constituted said Bevis Bros. and M. L. Bevis their agents for the purpose of procuring such loan; That said Hays and wife agreed to pay to said M. L. Bevis and Bevis Bros. a commission of Two Hundred and Fifty ($250) Dollars in the event the said loan was procured; That at the time of the making of such note and mortgage said Bevis had obtained from complainant herein its agreement to loan to the said Hays and wife, on said mortgage security, the said sum of Five Thousand ($5,000) Dollars; That in taking, endorsing, assigning and transferring said note and mortgage and making settlement thereon with said Hays and wife, said M. L. Bevis acted as the mere broker and agent of said Hays and wife to procure said loan; That all monies paid to the said Hays and wife in settlement of said loan were the monies of this complainant; That said Bevis never advanced any money thereon to said Hays and wife or either of them and never became a creditor of the said Hays and wife or either of them; that said Bevis never has had any beneficial interest in said notes or mortgage, but the beneficial owner thereof at all times was and still is your complainant.

5. That thereafter and on, to-wit, the 11th day of October, 1911,

said James W. Hays and Lillie G. Hays, his wife, for a val-
17 uable consideration, made executed and delivered to said Quincy D. Chapman, a warranty deed to an undivided one-half interest in and to said lands subject to complainant's said mortgage; For Five Thousand Dollars, said deed being by said Chapman filed for record and recorded in Book 6, page 494, records of Grant County, Washington, and that as a part of the consideration for said transfer, said Quincy D. Chapman assumed and agreed to pay one-half of complainant's said mortgage.

6. That thereafter and on to-wit the 17th day of August, 1917, said James W. Hays and Lillie G. Hays, his wife, for a valuable consideration, made executed and delivered to said Quincy D. Chapman a warranty deed, covering all of the interest of said Hays and wife in and to said lands, by the terms of which deed said Quincy D. Chapman assumed and agreed to pay the said $5,000.00 mortgage heretofore described, together with all interest and accumulations thereon, and which said deed said Quincy D. Chapman caused to be filed and recorded in the office of the Auditor of Grant County, Washington, in Book 19 of Deeds, at page 174, on September 7, 1917.

7. That said James W. Hays and Lillie G. Hays, his wife, have ceased to have any interest in the said above described real estate or any part thereof.

8. That thereafter and on to-wit the 3d day of October, 1917, said Quincy D. Chapman for a valuable consideration made and entered into a written agreement with this complainant by the terms of which said mortgage was extended to January 1, 1923, and by the terms of which Quincy D. Chapman agreed to pay the same and the whole thereof, together with all accumulations of intrest thereon (a copy of which instrument of extension is hereto attached, marked "Exhibit A" and made a part of this Bill of Complain.)

9. That by the terms of said mortgage and said extension agreement, it was provided that in the event of default in the payment of the principal *of* interest of said note and mortgage, after the same should become due and payable, the holder thereof might declare the whole, both principal and interest, due and payable, without further notice and might immediately bring suit to foreclose said mortgage.

18 9. That the said Quincy D. Chapman died on or about the 21st day of December, 1921, testate, and by the terms of his will, defendants Millard F. Chapman and Mrs. H. Ferry, are sole devisees of said Quincy D. Chapman, deceased, and by virtue thereof, have or claim to have some right, title, estate, lien or equity in or to the property described in this Bill of Complaint, and are necessary and indispensible parties defendant to this action.

10. That thereafter and about the — day of January, 1922, said will was submitted to probate in the Superior Court of Spokane County, in the State of Washington, and Joseph F. Sexton was by said Court appointed as executor thereof and duly qualified as such and at all times has been and now is the duly appointed and acting executor of the estate of said Quincy L. Chapman, deceased.

11. That thereafter and on, to-wit: February 25th, 1922, complainant herein duly filed and served its claim as a creditor of the

estate of said Quincy D. Chapman (as provided by the laws of the State of Washington), in the sum of Five Thousand Four Hundred Twenty-nine Dollars and ninety cents ($5,429.90), and then and there by reason of the fact that said mortgage and note was then in default for payment of interest, declared the whole of the same, both principal and interest, due and payable. That thereafter, and on, to-wit, the 22d day of March, 1922, said Joseph F. Sexton, executor as aforesaid, caused the said claim to be disallowed.

12. That said note and mortgage provided for the allowance of a reasonable attorney's fee to complainant in the event of foreclosure and that the sum of Six Hundred ($600) Dollars is a reasonable sum to be allowed therefor.

13. That said mortgage contains a provision that in the event said premises do not sell for sufficient to pay the same, together with accumulations of interest and costs, that complainant herein might have and recover a deficiency judgment therefor.

19 14. That said mortgage provides that the purchaser at the *the* foreclosure sale held thereunder shall be entitled to the possession of said lands during the period of redemption.

15. That said note and mortgage provides that overdue interest and principal shall bear interest at the rate of ten percent per annum.

16. That no other action or proceedings has been commenced or is now pending for the collection of said note or foreclosure of said mortgage.

17. That the above named defendants and each of them have or claim to have some right, title, interest, equity, or estate in and to the above described premises or some part thereof, but complainant alleges that whatever right, title, estate, lien, interest, or equity said defendants or any of them have in or to said premises the same is inferior, subordinate and subsequent to complainant's rights by virtue of said mortgage.

18. That defendants have failed, neglected and refused to pay any part of said principal note, have also failed to pay the interest due thereon January 1st, 1922, or any part thereof and by reason thereof there is now due and owing to this complainant thereon from the estate of said Quincy D. Chapman, the sum of Five Thousand Dollars, with interest thereon from January 1st, 1922, at the rate of seven percent per annum; Three Hundred and Fifty Dollars with interest thereon from January 1st, 1922, at the rate of ten percent per annum together with complainant's attorney's fees, costs and disbursements herein.

Wherefore, This complainant prays judgment against defendants Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased in the following sums: The sum of Five Thousand ($5,000) Dollars, with interest thereon from January 1, 1922, at the rate of seven percent per annum, Three Hundred and Fifty ($350) Dollars, with interest thereon from January 1st, 1922, at the rate of ten percent per annum, the sum of six Hundred ($600) Dollars, attorney's fees, and complainant's costs and disbursements in this action.

20 Complainant further prays that each and all of the above sums be declared a good and valid lien against the premises above described, under and by virtue of said mortgage; That said mortgage be foreclosed and the premises covered thereby ordered sold in the manner provided by law and in accordance with the practice of this Court, the proceeds of said sale to be applied to the payment of (1) the costs and disbursements herein, including costs of sale, (2) to the amount adjudged to be due complainant under the said mortgage, including interest and attorney's fees, and in the event the proceeds of said sale be insufficient to fully pay said judgment in the amount so found due complainant herein, that complainant have personal judgment against defendant, Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, for any sum then remaining unpaid, and that said executor be directed to pay said judgment out of the assets of the estate of the said Quincy D. Chapman, deceased, all in the manner provided by law.

That the purchaser at said sale be entitled to possession of said property upon production of the Certificate of Sale therefor, from the officer holding such sale.

And for such other and further relief as to the Court may seem equitable, legal and warranted by the facts herein set forth. L. H. Brown, Attorney of Record for Complainant Herein. Lawrence H. Brown, Attorney for Complainant; Post Office Address 801 Old National Bank Bldg., Spokane, Washington.

[File endorsement omitted.]

21 In the District Court of the United States for the Eastern District of Washington, Northern Division.

[Title omitted.]

Answer to Amended Bill of Complaint.

[Filed Aug. 10, 1922.]

Come now the defendants and for answer to the amended bill of complaint:

1. Admit the allegations in Paragraph 2 of the bill, except that defendants deny that the said notes was made, executed and delivered on September 3, 1908, or at any other time than September 1, 1908.

2. That as to the allegations contained in Paragraph 4 of the bill, that said M. L. Bevis on the 4th day of September, 1908, endorsed or transferred said promissory note, or delivered the same at said time to complainant, these defendants have no knowledge or information sufficient to form a belief, and deny the same, except that they admit the said note was at some subsequent time endorsed and transferred by said M. L. Bevis; that as to the allegations in said paragraph that complainant at all times since the making of said note and mortgage has been the owner and holder thereof, or entitled to any sums which became due and are due thereon, and that on Sep-

tember 3, 1908, James W. Hays and wife made written application to M. L. Bevis, or Bevis Bros., or either of them, for a loan of $5,000.00 on the land described in the bill or in any such application constituted Bevis Bros., M. L. Bevis, or any of them, their agents for the purpose of procuring such loan, or that said Hays
22 and wife agreed to pay M. L. Bevis, or Bevis Bros., a commission of $250.00 in the event a loan was procured, and the allegation that at the time of the making of such note and mortgage said Bevis had obtained from complainant its agreement to loan to said Hays and wife on such mortgage security, or otherwise, the sum of $5,000.00, or any other sum, and the allegation that in taking, endorsing, assigning and transferring said note and mortgage, or in doing any of said things, or making settlement thereof with Hays and wife said M. L. Bevis acted as the mere broker and agent of Hays and wife to procure said loan, or otherwise, or that all moneys paid to said Hays and wife in settlement of said loan were the moneys of complainant, or that Bevis never advanced any money thereon to said Hays and wife, or either of them, and never became a creditor of said Hays and wife, or either of them, or that the said Bevis never had any beneficial interest in said note and mortgage, but the beneficial owner thereof at all times was, and still is, complainant, these defendants deny each and every of said allegations.

3. That as to the allegations contained in Paragraph 5 that on October 11, 1911, or at any other time said Quincy D. Chapman, as a part of the consideration for the transfer to him by Hays and wife of an undivided half interest in the said lands, or otherwise, assumed and agreed to pay one-half of complainant's mortgage, these defendants deny each and every of said allegations.

4. That as to the allegations contained in paragraph 6 of the bill that on August 17, 1917, or any other time, said Hays and wife executed or delivered to said Quincy D. Chapman a warranty deed covering all or any of the interests of Hays and wife in or to said lands, and the further allegation that by the terms of such deed said Chapman assumed, or agreed to pay, said mortgage, or any part thereof, together with all or any interest or accumulations thereof, or that said Chapman caused any such deed to be filed or recorded in the office of the Auditor of Grant County, or elsewhere, these defendants deny each and every of said allegations, except that they admit that an instrument in the form of a deed was executed by said Hays and wife in favor of the said Chapman, and was filed by them, which deed, however, was intended to be as security for an
23 indebtedness due from Hays and wife to said Chapman.

5. That as to the allegations contained in paragraph 7 that said James W. Hays and Lillie G. Hays, or either of them have ceased having interest in said real estate, these defendants deny the same.

6. That as to the allegations contained in paragraph 8 of the bill to the effect that said Quincy D. Chapman, by written agreement of date October 3, 1917, or of any other date, or in any other manner, agreed to pay the said mortgage debt, or any part thereof, or any accumulations of interest thereon, these defendants deny each

and every of said allegations; but do admit that said Chapman executed an instrument as shown by Exhibit "A" attached to the bill.

7. That as to the allegations contained in Paragraph 12 of the bill that $600.00 is a reasonable attorney's fee, these defendants deny each and every of said allegations.

8. That as to the allegations contained in paragraph 18 of the bill that there is due, or owing, the complainant from the estate of Quincy D. Chapman the sum of $5,000.00, with interest from January 1, 1922, or any other sum, or any amount for attorney's fees, or any amount on account of interest that was matured on January 1, 1922, these defendants deny each and every of said allegations.

Further answering said bill as so amended, and by way of motion to dismiss, these defendants allege:

1. That the defendant Millard F. Chapman is now and was at all the times mentioned in the bill, a resident and citizen of the State of Michigan, and the defendant Mrs. H. Ferry was at all the said times, a resident and citizen of the State of Ohio, and the said Joseph F. Sexton, executor, and said Quincy D. Chapman were at all the said times residents and citizens of the State of Washington; that at the time when said note and mortgage were executed M. L. Bevis, the original payee, was a resident and citizen of the State of Washington, and at all times since has been a resident and citizen of the State of Washington.

2. That the said mortgage note referred to in the bill was and is non-negotiable in form.

24 3. That at the time of the commencement of this action the controversey was not between citizens of different states within the contemplation of the statutes of the United States and this court has never acquired jurisdiction over the controversy.

Having thus made a full answer to all matters and things contained in the bill, these defendants pray that the bill be dismissed and for their costs in this behalf incurred. Jas. A. Williams, R. J. Danson, Robert W. Danson, Solicitors for Defendants.

[File endorsement omitted.]

25 In the District Court of the United States for the Eastern District of Washington, Northern Division.

In Equity. No. 3980.

[Title omitted.]

Appellant's Statement of Facts and Evidence.

[Lodged Feb. 13, 1923.]

The issues in this action came on for trial before the Honorable Frank H. Rudkin, Judge of the District Court for the Eastern District of Washington, Northern Division, at Spokane, in said Dis-

trict, on the 25th day of October, 1922, before the Court without a jury. Complainant, by its counsel, opened the case, whereupon the following evidence was introduced:

[File endorsement omitted.]

26 GILBERT E. WOODS, a witness produced on behalf of complainant, being duly sworn, testified on direct examination as follows:

I am President of Citizens Savings Bank and Trust Company, complainant herein, and have been connected with them for thirty-two years. We had had business relations with Bevis and Bevis Brothers prior to the Hays transaction. We had bought loans from them, as we did the Hays loan, but they were not our agents.

The history of the Hays loan is this: On September 3, 1908, we received the telegram from Bevis Brothers, (marked plaintiff's exhibit 1), and on the same day telegraphed our reply to the same, to the effect that we would accept the loan, and at the same time wrote Bevis Bros a letter, confirming the telegram of September 3d. Bevis Bros. wrote us the letter (marked plaintiff's exhibit 2) with which was inclosed a copy of the telegram (plaintiff's exhibit 1) which letter was received by us in the usual course of mail, probably about September 9th, 1908. Also inclosed with that Exhibit two, was the application for loan (Plaintiff's exhibit 4). On September 4th, 1908, Bevis wrote us the letter marked plaintiff's exhibit 3 and on September 16th 1908 wrote us the letter (plaintiff's exhibit 5) inclosing with same the original mortgage, duly recorded (plaintiff's exhibit 6). On September 28, 1908, Bevis wrote us a letter (plaintiff's exhibit 7) with which was inclosed an assignment (plaintiff's exhibit 1A) of the mortgage referred to, duly executed by M. L. Bevis, and previously recorded in the office of the Auditor of Douglas, now Grant County, Washington. This was received by us in the usual course of mail. I do not have the assignment and have made diligent search for it, but cannot find it, and do not know where it is.

Plaintiff's exhibit 8 is the note of Hays and wife for $5,000.00. This was received by us about September 9, 1908, it being attached to a draft on us by Bevis Bros. (Plaintiff's exhibit 9), for $3,694.94, dated September 4, 1908. This draft we paid on presentment about September 9th. This difference between the amount of the draft and the face of the loan was accounted for by a loan of $1,-
27 300.00, which we had paid Bevis Bros. for, and which we did not accept, so that Bevis Bros. had on hand at the time of making draft on us $1,305.06.

The Citizens Savings Bank and Trust Company at all times since the making of said note and mortgage has been and still is the owner and holder thereof. We never loaned any money to Bevis or Bevis Bros. and the money used to take up the draft was the money of Citizens Savings Bank and Trust Company.

Complainant's exhibit 15 is the envelope on which was kept the record of this loan by the Citizens Savings Bank and Trust Company. The initials on the bottom of the envelope are the initials of the respective directors approving the loan.

Our relations with Bevis Bros. at the time was this: They would find a loan, then wire us that they had it, and could make it. If we accepted it, they would complete the loan and draw on us, then settle with the borrower. I do not understand that they made any investments for us or consummated any loans until they got our money. As to their making an investment, they would do the same as in this Hays case. They would submit wire or application, which we would accept or reject. If we accepted they would go ahead and consummate the transaction. If we agreed to take the loan, we would complete it, as far as we were concerned.

The directors' initials on the envelope, plaintiff's exhibit 15, was our usual and customary way of having a loan approved by the Directors.

On cross-examination, Gilbert E. Woods testified as follows:

The Citizens Savings Bank and Trust Company never maintained any office for the transaction of business in the State of Washington, never had any agent in the State of Washington, representing it for the purpose of making loans; never maintained any money in the State of Washington for investment purposes; never passed any resolution constituting M. L. Bevis or Bevis Bros. as our
28 agents; never gave Bevis or Bevis Bros. any authority to make loans which our Trust Company was obligated to take and our dealings with Mr. Bevis or Bevis Bros. were that as we had money to invest we would buy securities that were offered us and which appealed to us as being good investments, the question of security being passed upon by us. We had arrangements with Bevis that if, after we bought a loan we found it unsatisfactory, he would repurchase.

So far as our dealings with Bevis were concerned, he would make his investments and would send us on the application, and if we saw fit to take it, we would wire him or write him.

By Mr. Williams, of counsel for defendants:

Q. "Otherwise he would have to look elsewhere for the purchase?"

By Mr. Woods:

A. "He probably would."

The $1,300.00 used for paying on the Hays note and mortgage was a loan we had previously purchased from Bevis and paid $1,300.00 for it, and later, when we came to see the papers, we were not satisfied and required him to take it up and he did so, by crediting us on this Hays loan.

By Mr. Williams:

Q. "In answer to a question by Mr. Porter you said that the Citizens Savings Bank & Trust Company has been the owner of this note and mortgage at all times since its date. What you mean is that since you acquired it by this purchase from Bevis or Bevis Bros., is it not?"

By Mr. Woods:

A. "I suppose it was ours from the time we paid for it."

29 M. L. BEVIS, a witness for complainant, being duly sworn, testified on direct, as follows:

In September, 1908, I was a member of the firm of Bevis Bros., engaged in the farm mortgage loan business at Spokane, Washington, and I was the general manager of the Spokane office. We were engaged in selling, not buying real estate mortgage loans. We were what is known as mortgage loan brokers.

I recognize plaintiff's exhibit four. It is the original application to Bevis Bros. for the loan, was signed by Mr. Hays on September 3, 1908. The farm report attached is a part of the same instrument and the initials "OK MLB" are my own initials in my own handwriting, and the signature of Bevis Bros. was made by me.

Plaintiff's exhibit 6 is the original mortgage given by Hays and wife to M. L. Bevis.

Exhibit 8 is the original mortgage note from which the coupons have been detached.

Exhibit 9 is a draft and bears my signature.

Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 15, 1A, and 6A were offered and received in evidence.

I remember this loan to Hays. The facts with respect to the payment by the Citizens to us are as follows:—We took the original note (plaintiff's Exhibit 8) with sight draft (plaintiff's exhibit 9) attached to the Old National Bank of Spokane and they gave us credit for it on account, and we used the money. I do not have a distinct recollection as to when we paid the money over to Hays. We had so much business those days that I don't remember, but we paid him the money.

Plaintiff's Exhibit 6A is the original statement that we furnished Mr. Hays when we closed the account. It bears my signature. I do not recollect the delivery of it to Mr. Hays. I think my chief clerk probably delivered it to him. I guess it was delivered on or about the day it bears date. Mr. Hays' office at that time was in the same building with us in Spokane.

30 The loan was made about September 3d. We usually dated the note the first of the month for a matter of interest convenience, and that was done in this case, so that the date September 1st, was merely a matter of convenience.

On cross-examination, Mr. Bevis testified as follows:

I started in the mortgage loan business in 1883, and we have done a large business.

Q. "And when you took a mortgage, when you were making these mortgages, were you making them for yourselves, or were you making them for somebody else?"

A. We were making them to sell again; always sold those things.

When we took them we sometimes knew to whom we would sell them and sometimes not. We had some money to carry on our business, but we usually kept it pretty well invested. We always had a good bank account. When we took a mortgage—got a mortgage and note—we would offer it for sale to three or four and sometimes half a dozen parties or persons. That could be done either by telegram or letter. When I took this mortgage and note and application I did not know then whether the Citizens Savings Bank and Trust Company would buy it of us or not.

I wired the Citizens Savings & Trust Company on September 3d, 1908 (plaintiff's Exhibit 1), and it was replied to by the Citizens by a wire received by me on the fourth.

The money we paid Mr. Hays on account of this loan came out of our general bank account, and the proceeds of the draft drawn on the Citizens Savings Bank and Trust Company went into our general account.

In all cases Bevis Bros. personally made out their own checks and the borrower did not know how we handled his money.

We did not have any arrangement with Mr. Hays that we were going to sell the mortgage and note, but he must have known I had to sell these loans again.

31 When we took the note and mortgage, we handled it as we saw fit and there was no agreement between us and Mr. Hays that the payment to him was to be dependent on whether we sold it or did not sell it.

Mr. Williams:

Q. "I call yur attention to Exhibit 6A I believe it is. In that I notice that in making settlement with Mr. Hays, there was one check for $1,000, another for $1,000 and one for $2,752.00. How did it happen that you gave that to Hays in several checks?"

Bevis:

A. "Well, we probably wanted a few days to satisfy ourselves in regard to the title before we would pay out all of the money. There might have been some prior loan, or judgment, or taxes, or something of that kind."

I can tell from the numbers on the checks to Hays that the payments were made on different dates. There was perhaps a difference of a week between the first one and the last one. We always wanted a little time to see if the title was good.

J. W. Hays, a witness for complainant, being duly sworn, testified as follows, on direct examination:

I, with my wife, made the notes and mortgage in question in September, 1908. It was signed and acknowledged on September 5d. I received statement marked plaintiff's exhibit 6; as I remember it, I received it on September 21st, the day it bears date. The $250.00 item in there for commission was the amount we had agreed upon and it was deducted. I received $1,000.00 on September 5th, 1908; on September 17, 1908, I received another thousand and on September 22d, 1908, the balance of $2,752.51.

32 The cause was then summed up by the respective counsel and submitted to the Court, and the Court thereafter, and on November 15, 1922, made and entered its order, dismissing said cause for want of jurisdiction.

In United States District Court.

Order Settling Statement of Evidence.

The foregoing case contains all of the evidence given and received at the trial of said action, material to the determination of this appeal and the undersigned, acting District Judge of the United States, for the Eastern District of Washington, Northern Division, upon due notice and at the request of counsel for the appellant, has settled and signed this case, to the end that the same may be made a part of the record herein this 16 day of March, 1923. Jeremiah Neterer, United States District Judge.

33 In the District Court of the United States for the Eastern District of Washington, Northern Division.

[Title omitted.]

Order of Dismissal.

[Filed Nov. 11, 1922.]

This cause came on regularly for trial heretofore, the complainant, Citizens Savings Bank & Trust Company, a corporation, appearing by its solicitor L. H. Brown, and the defendants, Joseph F. Sexton, as Executor of the Estate of Quincy D. Chapman, Deceased, Millard F. Chapman and Mrs. H. Ferry, appearing by their solicitor Jas. A. Williams and thereupon the complainant and defendants presented their evidence and rested, and the Court having heard the arguments of counsel and having heretofore filed its opinion ordering the action dismissed for want of jurisdiction and being now advised in the premises,

It is ordered, That this action be and the same is dismissed for want of jurisdiction of this Court to entertain or determine this case

and that this dismissal be without prejudice to the institution of any other action.

Done in open Court this 15th day of November, 1922. Frank H. Rudkin, District Judge.

[File endorsement omitted.]

34 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

Equity. No. 3980.

[Title omitted.]

Petition for Allowance of Appeal.

[Filed Feb. 6, 1923.]

The above named appellant, Citizens Savings Bank and Trust Company, feeling aggrieved by the judgment and decree of the United States District Court, for the Eastern District of Washington, Northern Division, rendered on the fifteenth day of November, 1922, dismissing the above entitled cause for want of jurisdiction, does hereby appeal from said decree of the said United States District Court to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith.

The matter in controversy in said action and on said appeal exceeding the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, the cause is one in which an appeal to the Supreme Court of the United States is a matter of right.

Wherefore the appellant prays that an appeal be allowed it in the above entitled cause and that a citation be issued as provided by law, and that a transcript of the record and proceedings in said cause including any agreed statement on file in the office of the clerk of said district court, with all things concerning the same, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., in order that the errors complained of in the assignment of erros herein filed by the appellant may be re-
35 viewed, and if error be found, corrected according to the laws and customs of the United States. Lawrence H. Brown, Solicitor for Appellant.

In United States District Court.

Order Allowing Appeal.

[Filed Feb. 6, 1923.]

It is hereby ordered that the appeal prayed for by the above named appellant from the order of the United States District Court dismissing the above entitled cause for want of jurisdiction be allowed

to the Supreme Court of the United States, and that a certified transcript of the record and proceedings in said cause, including any agreed records of the statement of facts, filed therein, together with the decree of the United States District Court be certified and transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars.

Dated, this 7 day of February, 1923. Jeremiah Neterer, Presiding U. S. District Judge for the Eastern District of Washington, Northern Division.

[File endorsement omitted.]

36 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

[Title omitted.]

Assignment of Errors.

[Filed Feb. 6, 1923.]

Now comes the Citizens Savings Bank and Trust Company, a corporation, the complainant and appellant in the above entitled cause and files the following assignment of errors:

1. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in holding that M. L. Bevis was not a mere "nominal holder" of the note and mortgage assigned by him to the complainant and appellant, Citizens Savings Bank & Trust Company, and sought to be foreclosed by this action, and in holding that said Bevis had a beneficial interest therein or right of action thereon.

2. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in dismissing the suit.

3. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in dismissing the suit for lack of jurisdiction.

4. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in rendering a judgment dismissing said cause for want of jurisdiction on the facts found.

37 & 38 5. That the District Court of the United States for the Eastern District of Washington, Northern Division erred in not retaining jurisdiction as to appellee, Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, he having appeared generally by filing his answer to appellant's Bill of Complaint, waiving objection to jurisdiction, and thus investing the Court with jurisdiction over him.

6. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in holding that

said Bevis Bros., were not the agents of J. W. Hays and wife, the makers of said note and mortgage, in negotiating with complainant, Citizens Savings Bank & Trust Company for the loan secured by the note and mortgage set forth in complainant's (appellant's) Bill of Complaint in this cause.

7. That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in holding that the requisite diversity of citizenship did not exist between appellant, Citizens Savings Bank and Trust Company and appellees, Joseph F. Sexton, as executor, Millard F. Chapman, and Mrs. H. Ferry, by virtue of execution and delivery of the original written agreement between Citizens Savings Bank and Trust Company, appellant, and Quincy D. Chapman, now deceased (and now represented by his executor, Joseph F. Sexton) in which said written agreement M. L. Bevis was not a party, but in which the original obligors and obligees were residents of different states, wherein and whereby said Quincy D. Chapman, now deceased, agreed to assume and did assume and agree to pay, for a valuable consideration, certain stipulated sums, representing the unpaid balance of the note and mortgage set out in appellant's Bill of Complaint in this cause. Lawrence H. Brown, Solicitor for Appellant.

[File endorsement omitted.]

39 & 40 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

[Title omitted.]

Citation on Appeal.

[Filed Feb. 8, 1923.]

UNITED STATES OF AMERICA,
Ninth Circuit:

To Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, Millard F. Chapman, and Mrs. H. Ferry, Greeting:

You and each of you are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, within sixty days after the date of this citation, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the District Court of the United States, for the Eastern District of Washington, Northern Division, from a final decree, signed, filed and entered on the fifteenth day of November, 1922, in that certain suit being in equity No. 3980, wherein the Citizens Savings Bank and Trust Company is plaintiff and appellant and you are defendants and appellees, to show cause, if any there by, why the decree rendered against the

said appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Jeremiah Neterer, United States District Judge holding term for the Eastern District of Washington, and the seal of the said United States District Court this 8th day of February, 1923. Jeremiah Neterer, United States District Judge, acting for the Eastern District of Washington, Northern Division. [Seal of the United States District Court, Eastern District of Washington.]

41 [File endorsement omitted.]

42 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

In Equity. No. 3980.

[Title omitted.]

Appeal Bond.

[Filed Feb. 10, 1923.]

Know all men by these presents That we, Citizens Savings Bank and Trust Company, a corporation, organized and existing under and by virtue of the laws of the State of Vermont, of St. Johnsbury, Vermont, as principal, and National Surety Company, of New York, a Corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to act as surety and to do business in the State of Washington, as Surety, are held and firmly bound unto Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, Millard F. Chapman and Mrs. H. Ferry, appellees above named, in the full and just sum of Five Hundred ($500) Dollars, for the payment of which well and truly to be made we hereby bind our, and each of our executors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Spokane, Washington, this 9th day of February, 1923.

Whereas the appellant above named has duly appealed from the final Decree and Order of Dismissal herein to the Supreme Court of the United States, and

43 Whereas the above entitled Court fixed the amount of the bond to be given by said appellant on its appeal in the sum of Five Hundred ($500) Dollars,

Now therefore, if the appellant shall prosecute its appeal to effect, and if it fails to make its plea good, shall answer all costs, then this obligation shall be null and void, otherwise to remain in full force and effect. Citizens Savings Bank & Trust Company, By L. H.

Brown, Its Agent and Attorney. National Surety Company. James A. Brown, Resident Vice President. G. B. Ferguson, Resident Asst. Secretary.

The foregoing bond and the surety therein is approved this 12 day of February, 1923. Jeremiah Neterer, Acting United States District Judge for the Eastern District of Washington, Northern Division.

O. K. as to signatures and amount. Danson, Williams & Danson, Solicitors for Defendants.

[File endorsement omitted.]

44 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

Equity. No. 3980.

[Title omitted.]

Notice of Filing of Appellants' Statement of Facts and Evidence.

[Filed Feb. 13, 1923.]

To the above-named appellees and to R. J. Danson, J. A. Williams, and R. W. Danson, your counsel:

You and each of you are hereby notified that appellant above named has filed with the Clerk of the above Court the attached statement of facts and evidence for use on appeal, and that on Monday, February 26th, 1923, at Ten o'clock A. M., he will present the same to the Judge of the above entitled Court at the Federal Court Room in Spokane, Washington, for approval by the Court.

Dated this 13th day of February, 1923. Lawrence H. Brown, Solicitor for Appellant.

[File endorsement omitted.]

45 In the District Court of the United States for the Eastern District of Washington, Northern Division.

In Equity. No. 3980.

[Title omitted.]

Præcipe for Record on Appeal.

[Filed Feb. 13, 1923.]

To the Clerk of the above entitled Court:

Please prepare and certify forthwith the following as the portions of the record in this case to be incorporated in the transcript on appeal:

1. Bill of Complaint filed April 15, 1922.
2. Answer of Joseph F. Sexton, executor, filed May 4, 1922.
3. Bill of Complaint as amended, filed August 21, 1922, less Exhibit A attached.
4. Answer to Bill of Complaint as amended, filed August 10, 1922.
5. Plaintiff's exhibits, 1, 2, 3, 4, 5, 6, 7, 8, 9, 15, 1A and 6A.
6. Statement of facts and evidence.
7. Decree dismissing case for want of jurisdiction, dated November 15th, 1922.
8. Petition for allowance of appeal and order allowing appeal, filed February 6, 1923.
9. Appellant's assignment of errors, filed February 6, 1923.
10. Citation on appeal, filed February 8, 1923.
11. Appellant's bond on appeal.
12. Notice of filing statement of facts and evidence.
13. Præcipe for record.
14. Acceptance of service.
15. Memorandum Opinion of Judge Rudkin.

Lawrence H. Brown, Solicitor for appellant.

[File endorsement omitted.]

46 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

In Equity. No. 3890.

[Title omitted.]

Acceptance of Service.

[Filed Feb. 13, 1923.]

Service of the Citation on Appeal of the above entitled cause from the judgment and decree of the District Court of the United States for the Eastern District of Washington, Northern Division, to the Supreme Court of the United States, and the praecipe for record on appeal of said cause, and the receipt of copies of the petition for the allowance of the appeal, order allowing appeal, appellant's proposed statement of facts and evidence, and Notice of Presentment of same for approval, the assignment of errors, and the appeal bond for the appeal of said cause, is hereby admitted on this 13th day of February, 1923. Jas. A. Williams, Of Counsel for Appellees.

[File endorsement omitted.]

47 In the District Court of the United States for the Eastern District of Washington, Northern Division.

[Title omitted.]

Memorandum Opinion.

[Filed Nov. 10, 1922.]

L. H. Brown, Attorney for the Plaintiff.
Danson, Williams & Danson, Attorneys for the Defendants.

RUDKIN, *District Judge:* This is a suit by an assignee to foreclose a mortgage and for a deficiency judgment against the grantee of the mortgaged premises, who assumed the mortgage debt. At the threshold of the case the plaintiff is confronted with the objection that the court is without jurisdiction. Section 24 of the Judicial Code provides:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment has been made."

Jurisdiction in this case rests on diversity of citizenship, and inasmuch as the original parties to the mortgage were all citizens of this

state the presumption is against jurisdiction, and the facts giving it must be clearly and positively averred and proved.

Commercial Trust Co. v. Laurens County, 267 Fed. 901.

It has been repeatedly held that this limitation of jurisdiction of United States Courts has no application where the payee named in the note never had any beneficial interest therein or right of action thereon, but acted merely as an agent for the real party in interest.

48 Holmes v. Goldsmith, 147 U. S. 150.
Wachusett National Bank v. Sioux City Stove Works, 56 Fed. 321.
Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288.
Baltimore Trust Co. v. Screven County, 238 Fed. 834.
Commercial Trust Co. v. Laurens County, supra.

In my opinion the plaintiff has failed to bring itself within the rule announced and applied in these cases. The application for the loan was made by a citizen of this state to Bevis Brothers, who were citizens of the same state. The note and mortgage were executed to or in favor of a member of that firm, and were negotiated and sold by the firm as independent operators and contractors. They might have sold the note and mortgage to the plaintiff or to any other person or concern. They might have sold them according to their custom either before or after the advancement of the money, but whether sold, or when sold, or to whom sold rested entirely with them. They were not acting as agents for the plaintiff, nor were they acting as agents for the mortgagors. Whatever obligation was assumed upon the execution of the note and mortgage was assumed by Bevis Brothers and by no one else, and had they refused to advance the money on the note and mortgage a right of action would accrue against them, and against them alone. Attention has been directed to the fact that a charge for a commission appears on the statement furnished to the mortgagors, but that fact of itself is not controlling. Bevis Brothers were engaged in the mortgage loan business and of course were engaged in that business for profit. Their profit or compensation would in the end come from the mortgagors in the form of a commission, in the form of a second mortgage, or in the form of an increased rate of interest, but whatever form the transaction might take it could not establish an agency where an agency did not otherwise exist. The case differs in no respect from the ordinary case where a person purchases property for resale.

49 It was suggested on the argument that inasmuch as the suit is brought upon the assumption agreement contained in the deed and not upon the note and mortgage, the requisite diversity of citizenship exists in any event, but with this contention I am unable to agree. Discussing a similar question in American Waterworks & Guarantee Co. v. Home Water Co., 115 Fed. 171, 176, the Court said:

"But it is urged that, as complainant does not claim by privity of contract, but by right of subrogation, this rule does not apply, if the necessary diversity of citizenship between the subrogee and the debtor exists. While it is true that the right of subrogation does not depend upon privity between the parties, but is the creature of courts of equity, yet the subrogee is merely an equitable assignee, and for jurisdictional purposes can have no greater rights than the assignee of a chose in action. As the water company, the assignor, could not maintain an action in this court on account of diversity of citizenship, neither can its assignees, whether they are such by contract of the parties or by subrogation."

For these reasons the court is without jurisdiction, and the complaint must be dismissed without expressing any opinion upon the merits.

It is so ordered.

[File endorsement omitted.]

50 **Clerk's Certificate.**

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a complete, true and correct copy of the record, pleadings, orders and all proceedings had in said action, as called for by the Præcipe for record on appeal, and the same which I transmit constitute my return to the order of appeal, filed in my office on the 6th day of February, 1923.

I hereby annex and transmit the original Citation issued and filed in said suit, and all exhibits called for in the Præcipe for record on appeal.

I further certify that the cost of preparing and certifying said record amounts to the sum of $20.90, and that the same has been paid in full by the complainant and appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Spokane, in said Eastern District of Washington, in the Ninth Judicial Circuit, this 20th day of March, A. D. 1923, and the Independence of the United States of America the One Hundred and Forty-seventh. Alan G. Paine, Clerk U. S. District Court for the Eastern District of Washington. [Seal of the United States District Court, Eastern District of Washington.]

Endorsed on cover: File No. 29,483. Eastern Washington D. C. U. S. Term No. 933. Citizens Savings Bank and Trust Company, appellant, vs. Joseph F. Sexton, as executor of the estate of Quincy D. Chapman, deceased, et al. Filed March 27th, 1923. File No. 29,483.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1922

NO. 933 261

CITIZENS SAVINGS BANK AND TRUST COMPANY,
Appellant,

vs.

JOSEPH F. SEXTON, as executor of the estate of Quincy D. Chapman, deceased, et al,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

BRIEF OF APPELLANT.

FREDERICK W. DEWART,
Solicitor for Appellant.

LAWRENCE H. BROWN
Of Counsel.

IN THE

Supreme Court

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OCTOBER TERM, 1922

NO. 933

CITIZENS SAVINGS BANK AND TRUST COMPANY,
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JOSEPH F. SEXTON, as executor of the estate of Quincy D. Chapman, deceased, et al,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

In April, 1922, appellant, a Vermont Corporation, brought this action in equity, in the District Court for the Eastern District of Washington, Northern Di-

vision, to recover on a promissory note and to foreclose a mortgage, securing the same, on lands within the jurisdiction of said Court. Defendant (appellee) Sexton, as executor of the estate of Quincy D. Chapman, deceased, at all times was and is a resident of Washington, as had been Quincy D. Chapman, in his lifetime. Defendants (appellees) Millard F. Chapman and Mrs. H. Ferry were and are residents of Michigan and Ohio respectively, and were joined as defendants solely to bar their rights as heirs of Quincy D. Chapman, deceased, no other relief being asked against either of them. (Record p. 1-5.)

PLEADINGS.

To the original bill of complaint (Record p. 1-7), defendant Sexton, as executor, filed an answer. (Record pp. 7-9.) Thereafter an amended bill of complaint (Record pp. 10-14), to which was attached Exhibit "A" (Record pp. 8-10) was filed; this amended bill being in all material respects the same as the original bill, save certain allegations having to do with citizenship and jurisdiction, were added to the amended bill. (Record pp. 3-4 and 15-16.)

To this amended bill of complaint, all defendants answered, said answer (Record pp. 14-16) containing a plea to the jurisdiction, based on the allegations as

to residence of M. L. Bevis, the assignor of appellant.

The note and mortgage in question was made in 1908 by one J. W. Hays and wife, who thereafter transferred the land covered by the mortgage to Quincy D. Chapman, in his lifetime, and personal judgment against Chapman's estate was asked in the complaint on the theory that Chapman had assumed and agreed to pay the mortgage debt by virtue of certain recitations in a deed of conveyance to him, and by virtue of a written assumption agreement entered into between appellant and said Chapman direct. (Record pp. 8-10.)

The case was tried before the Court which later dismissed the same for want of jurisdiction, in that there was a lack of diverse citizenship. (Record pp. 21-22.) Therefore the facts submitted on the merits of said cause are only of moment as they may effect the question of jurisdiction.

FACTS RELATING TO CITIZENSHIP.

On September 3, 1908, M. L. Bevis, the payee of the note and mortgage in the mortgage described in the pleadings, was and at all times since has been a resident of Spokane, Washington. (Record p. 16.) On September 3, 1908, Bevis then was and for some years had been a member of the firm of Bevis Bros.,

real estate mortgage loan brokers, i. e. engaged in loaning other people's money on real estate security. (Record pp. 29.) Sometimes Bevis Bros. had the loan placed with a lender of moneys before the notes and mortgages were signed, and sometimes they did not have it so placed until afterward. (Record pp. 30.) In the instant case the detail becomes important and is as follows:

The Citizens Savings Bank & Trust Company had had previous business relations with Bevis & Bevis Bros. (who can hereafter be referred to as Bevis), and had bought various mortgage loans from Bevis, all previous to the Hays loan, though Bevis was not appellant's agent. (Record pp. 26.) On September 3, 1908, Bevis took from J. W. Hays and wife, citizens and residents of Washington, a signed application for loan (Exhibit 4), note, (Exhibit 5), (with interest coupons attached) and mortgage (Exhibit 6), though the papers for convenience of figuring were dated September 1st, as was the custom of mortgage brokers. (Record pp. 30.) The application for loan (Exhibit 4) was addressed to and on the form of Bevis Bros., though the note and mortgage ran to M. L. Bevis personally. The application, among other things provided:

> "In the event the loan being applied for not granted, or if the security offered should not prove to be as represented, or if I fail to accept the loan if granted, I agree to pay all expenses incurred

in examining the premises above described and the title thereto and in the negotiation of the loan; if granted, I will, if required, insure any buildings for the benefit of and to the satisfaction of the mortgagee; and I understand that the loan hereby applied for is made upon the representation as to said premises and the title to the same made by me in this application, and I do solemnly declare that the said representations are true in every particular.
Dated this 3d day of September, 1908.

J. W. HAYS."

On the same day (September 3d) Bevis telegraphed appellant as follows:

"Have another choice five thousand loan for James W. Hays on section worth sixteen thousand highly improved; can you take it, answer." (Exhibit 1.)

On the same day (September 3d) Bevis wrote appellant, confirming his wire (Exhibit 2), and inclosing the original loan application, signed by Hays. (Exhibit 4.)

On the same day (September 3d) appellant's directors approved the loan (Record pp. 26-27), and appellant wired Bevis accepting the loan. (Record pp. 26.)

On September 4th, 1908, Bevis wrote appellant confirming the appellant's acceptance (Exhibit 3), and

notifying appellant that draft was being made that day by Bevis on appellant for $3,694.94, which was the face of the Hays loan ($5,000), less $1,305.06, monies of appellant in Bevis hands, and thus appropriated by Bevis to the Hays loan fund, with appellant's approval. (Exhibit 3.)

On the same day (September 4th) Bevis drew on appellant for said $3,694.94, attaching to said draft the J. W. Hays note and deposited same in the Old National Bank of Spokane to the credit of Bevis. (Record pp. 29.) This draft was paid in due course on September 11th, and the note at all times since retained by appellant. (Record pp. 26-27.)

On the next day, September 5th, Bevis paid Hays $1,000.00 on account of the note, and mortgage matter, on September 17th, $1,000.00 more and the balance on September 22d. (Record pp. 31.)

The $1,000.00 paid on September 5th was the first money Hays received on account of the loan application and he did not receive full settlement until all matters of recording mortgage and examination of title had been attended to and approved.

Bevis executed the assignment of mortgage to appellant and after recording same mailed the same to appellant September 28, 1908. (Exhibit 7.)

ASSUMPTION OF MORTGAGE.

On September 19, 1917, nine years after the making of the mortgage, Quincy D. Chapman entered into an extension and assumption agreement with appellant, being set forth as an exhibit to the original and amended bills of complaint. (Record pp. 5-7.) In that agreement for and in consideration of the extension of the mortgage for a term of five years, the various parties, including Quincy D. Chapman, bound themselves to its terms and the terms of the note in the following words:

> "It is further agreed by all the parties hereto that all the other terms, provisions and conditions of the said note and mortgage in and all hereto shall be binding and obligatory upon the respective parties hereto."

SPECIFICATIONS OF ERRORS.

The order of the District Court of the United States for the Eastern District of Washington, Northern Division, dismissing said action (Record pp. 21-22) is erroneous in the following particulars:

1. The Court erred in holding (Record p. 48) that M. L. Bevis was not a mere nominal holder of the note and mortgage, transferred and assigned by him to the appellant and sought to be foreclosed by this

action, and in holding that said Bevis had a beneficial interest therein, or right of action thereon. (Assignments of Error No. 1, Record p. 23.)

2. The Court erred in dismissing said action for want of jurisdiction on the evidence submitted and facts found. (Assignments of Error Nos. 2, 3 and 4, Record p. 23.)

3. The Court erred in dismissing said action for want of jurisdiction as to defendant (appellee) Joseph F. Sexton, as administrator of the estate of Quincy D. Chapman, deceased, he having submitted to the jurisdiction of said District Court. (Assignments of Error, No. 5, Record p. 23.)

4. The Court erred in holding (Record p. 48), that said Bevis was not the agent of Hays and wife, the makers of the note and mortgage, in negotiating with appellant for the $5,000.00 loan in question. (Assignments of Error, No. 6, Record p. 24.)

5. The Court erred in holding (Record p. 49), diversity of citizenship between appellant and appellees did not exist by virtue of the making of the assumption agreement by appellant and said Chapman (deceased) (Record pp. 8 and 9), and set out as an exhibit to the original and amended bill of complaint. (Assignments of Error, No. 7, Record p. 24.)

ARGUMENT.

This appeal involves only the jurisdiction of the District Court from whence it is taken. In order to defeat the jurisdiction of the District Court, the appellees invoked Section 24 of the Judicial Code, which provides:

> "No District Court shall have cognizance of any suit—to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such Court to recover upon said note or other chose in action if no assignment has been made."

To the rule of this statute there is a well defined exception to the effect that where the plaintiff is the first and only holder of the note for value and where the payee of the instrument was a mere broker or agent and never advanced any money to or became a creditor of the maker thereof, the plaintiff, though in form an assignee, is in fact the original creditor and can maintain the suit.

Holmes vs. Goldsmith, 147 U. S. 150;

Commercial Trust Co. vs. Laurens County, 267 Fed. 901;

Kirven vs. Virginia-Carolina Chemical Co., 145 Fed. 288;

Baltimore Trust Co. vs. Screven County, 238 Fed. 834.

The application for the real estate loan was made by Hays and wife to Bevis Bros., whose citizenship does not appear save that M. L. Bevis, a member of that firm, was a resident of Washington. (Record pp. 19, 29.) It was made on the form of Bevis Bros. and was plainly only an application and not binding on any one until accepted by Bevis Bros. This is apparent from the terms of the application (Exhibit 4), such as:

> "In the event the loan being applied for (*be*) not granted or if the security offered should not prove to be as represented or if I fail to accept the loan if granted, I agree to pay all expenses incurred in examining the premises above described and the title thereto AND IN THE NEGOTIATION OF THE LOAN * * *."

While the note and mortgage running to M. L. Bevis were signed concurrently with the application to Bevis Bros., it is apparent that it was the intention of the parties that the papers constituted an application only and that the loan might or might not be granted. It does not appear that the loan was accepted or granted until the premises had been examined and the title examined and approved. This did not occur until September 5th at the earliest, the date the $1000.00 advance was made by Bevis Bros. to Hays. (Record pp. 31.)

It is equally plain that Bevis was made the agent of Hays for the negotiation of the loan, for the application says so. It is beside the question to discuss other deals made by Bevis or what the business custom of the firm was.

That Bevis was the agent of Hays for the sale of the mortgage paper must follow from the facts shown in this case. While the testimony is silent as to any words creating such an agency for such special purpose, it does not follow that such an agency was not created. The testimony of Hays is entirely silent on the subject. The testimony of Bevis is:

> "We were engaged in selling, not buying, mortgage loans. We were what is known as mortgage loan brokers * * * we did not have any arrangement with Mr. Hays that we were going to sell the mortgage and note, but he must have known we had to sell these loans again."
> (Record pp. 19 and 20.)

If Hays knew that Bevis was going to sell this loan and that Bevis always sold his loans, it follows that Hays, by delivering to Bevis, the note and mortgage, clothed Bevis with authority as his agent to dispose of the same. The well established doctrine of agency is that an agency may be shown to exist by implication from the facts, and that words of agency need not be used.

"Leaving a note with a broker gives to the purchaser from the broker the right to rely upon the representation that the broker is the agent of the maker."

Morris vs. Joyce, 63 N. J. Equity, 549; 53 Atlantic, 139-141.

"To our mind the transaction itself speaks louder than words. The facts are undisputed. The defendant drew the note and delivered it to Munson. There is no pretense that Munson paid anything therefor. Munson took the note to N. M. Allen & Son and transferred it to the firm by an assignment upon the back thereof. He did not in any manner endorse it so as to become liable thereon. * * * Allen & Son drew their draft for the amount—and delivered it to Munson. Munson took the draft and delivered it to the defendant who drew the money thereon."

Above quoted from Allen vs. Henry, 81 Hun. 241; 30 N. Y. Supp. 773, in which the Court holds the person so procuring money for another was his agent or at the least that the trial Court would be justified in so finding.

The facts in the case at bar are very similar to those set forth in Allen vs. Henry, Supra. In fact the only difference in facts is that the proceeds, instead of being delivered to Hays by Bevis by means of a draft or remittance signed by appellant, were delivered to Hays in the shape of checks by Bevis, representing

funds delivered to Bevis by appellant for that purpose.

On receipt of the note and mortgage, Bevis was not a holder for value for no value had been given therefor. Until the consideration to be advanced in the future, in the event of the acceptance of the loan, had been actually advanced to Hays, no right of action would lie on the instruments by Bevis against Hays.

Under the title "Bills and Notes," Ruling Case Law states:

> "In the intermediate time the obligation of the contract or promise is suspended; for until the performance of the condition of the promisee there is no consideration and the promise is *nudum pactum;* but on the performance of the condition by the promisee it is clothed with a valid consideration which relates back to the promise and then becomes obligatory."
>
> 3 *Ruling Case Law*, page 936;
>
> *Miller vs. McKenzie*, 95 New York 575; 47 Am. Rep. 85.

As soon as the first $1000.00 was paid to Hays on September 5th, life was given to the note and mortgage on which a cause of action could later be predicated; but that $1000.00 was paid out of monies belonging to appellant in the hands of Bevis Bros., namely the $1305.06 proceeds of a former deal. Not

until September 17th, long after the draft had been paid by appellant, and the mortgage recorded and assigned of record, was any more money paid to Hays. Certainly it cannot be contended that Bevis was not the agent of somebody in disbursing funds to Hays. The remainder, $2752.51, was not paid to Hays until the mortgage and assignment had been recorded and the title perfected. (Record pp. 17-21.) The loan was accepted by the directors of appellant corporation on September 3rd, and their initials approving it attached to the loan envelope, as was the custom of appellant. (Record p. 18.)

Upon payment of the first $1000, a contractual relation existed between appellant and Hays, whereon a cause of action could arise only in favor of appellant as it was appellant's money.

The suggestion that Hays could have brought suit against anyone until acceptance of the loan is refuted by the plain terms of the loan application. Hays could not force acceptance of the loan but, at best, could have demanded, in due time, a return of his note and cancellation of the mortgage.

The appellant was the original creditor of Hays and was the first and only holder for value of said note.

The cause of action never accrued to Bevis. None did accrue until the money was furnished, and it then accrued to appellant.

Paige vs. Town of Rochester, 137 Fed. 663.

"No cause or right of action against the defendant company arose upon the notes executed by it until the plaintiff Bank advanced the money thereon and the right of action then created never was vested in or belonged to the Union Loan & Trust Company."

Wachusett National Bank vs. Sioux City Stove Works, 56 Fed. 321.

"The petition, as amplified by amendment, alleges that Scarboro Company was the mere broker and agent of Laurens County, employed to sell the notes, and never advanced any money or credit for the notes or became at any time a creditor of the county, which owed no one anything until plaintiff paid its money for the notes to Scarboro Company, as the county's agent. Such facts would constitute the plaintiff, though in form an assignee, in substance an original creditor and as such it could maintain the suit."

Commercial Trust Co. vs. Laurens County, 267 Fed. 901-903.

Such facts may be shown by parol evidence.

Holmes vs. Goldsmith, Supra.

The spirit and purpose of the act should be controlling of this case and that is indicated and defined by this Court as follows:

> "It is quite plain that the plaintiff's action did not offend the spirit and purpose of this section of the act. The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal Court."

Holmes vs. Goldsmith, 147 U. S. 150;

Chase vs. Sheldon Roller Mills, 56 Fed. 625.

Federal Reserve Bank v. Wilcox 287 Fed 579

In Baltimore Trust Company vs. Screven County, 238 Fed. 834-836, the opinion states the purposes of the act and holds that "the language of the Statute is to be interpreted in accordance with the purpose to be effected and the mischief to be prevented."

In Kolze vs. Hoadley, 200 U. S. 76, Justice Brown stated the following proposition settled by the decisions of this Court:

> "That a suit may be maintained between the immediate parties to a promissory note as indorser and indorsee, provided the requisite diversity of citizenship appears as between them or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract. In such case the original contract may be considered to ascertain the amount of the damages."

In Power and Irrigation Co. vs. Capay Ditch Co., 226 Fed. 634-641), Judge Gilbert of the Circuit

Court of Appeals for the Ninth Circuit held that the statute in question does not apply "To actions arising upon breach of performance of a contract occurring after its assignment." So in the case at bar no right of action for any deficiency would lie against Chapman, deceased, or his executor, save by virtue of his contract of assumption and this suit, in other words, is an action to enforce his promise.

American Colorotype Co. vs. Continental Colorotype Co., 188 U. S. 104.

Whether or not it should be found that Chapman assumed the mortgage in question by virtue of being a grantee in a deed from Hays, containing an assumption clause; it follows that the rights and intention of the parties were expressed in the contract of September, 1917. (Record pp. 5-7.) Appellant did not become a party to this agreement under any doctrine of subrogation. With full knowledge of their respective rights appellant and Chapman, for a good and valuable consideration, to-wit: The extension of the loan, entered into an independent contract fixing their rights. If this be not such a new contract as will remove appellant from the application of Section 24 of the Judicial Code, it at least shows that the spirit of the act in question has not been violated by the appellant.

We submit that the District Court was in error in dismissing this suit for want of jurisdiction.

Respectfully submitted,

FREDERICK W. DEWART,
Solicitor for Appellant.

LAWRENCE H. BROWN
Of Counsel.

Tredway v. Sanger 107 U.S. 323
[illegible]assman v. Merges 112 U.S. 139
N. Orleans v. Benjamin 153 U.S. 411

or in

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1923.

No. 261

CITIZENS SAVINGS BANK & TRUST COMPANY,

Appellant.

vs.

JOSEPH F. SEXTON, EXECUTOR OF THE ESTATE OF QUINCY D. CHAPMAN, DECEASED, et al,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

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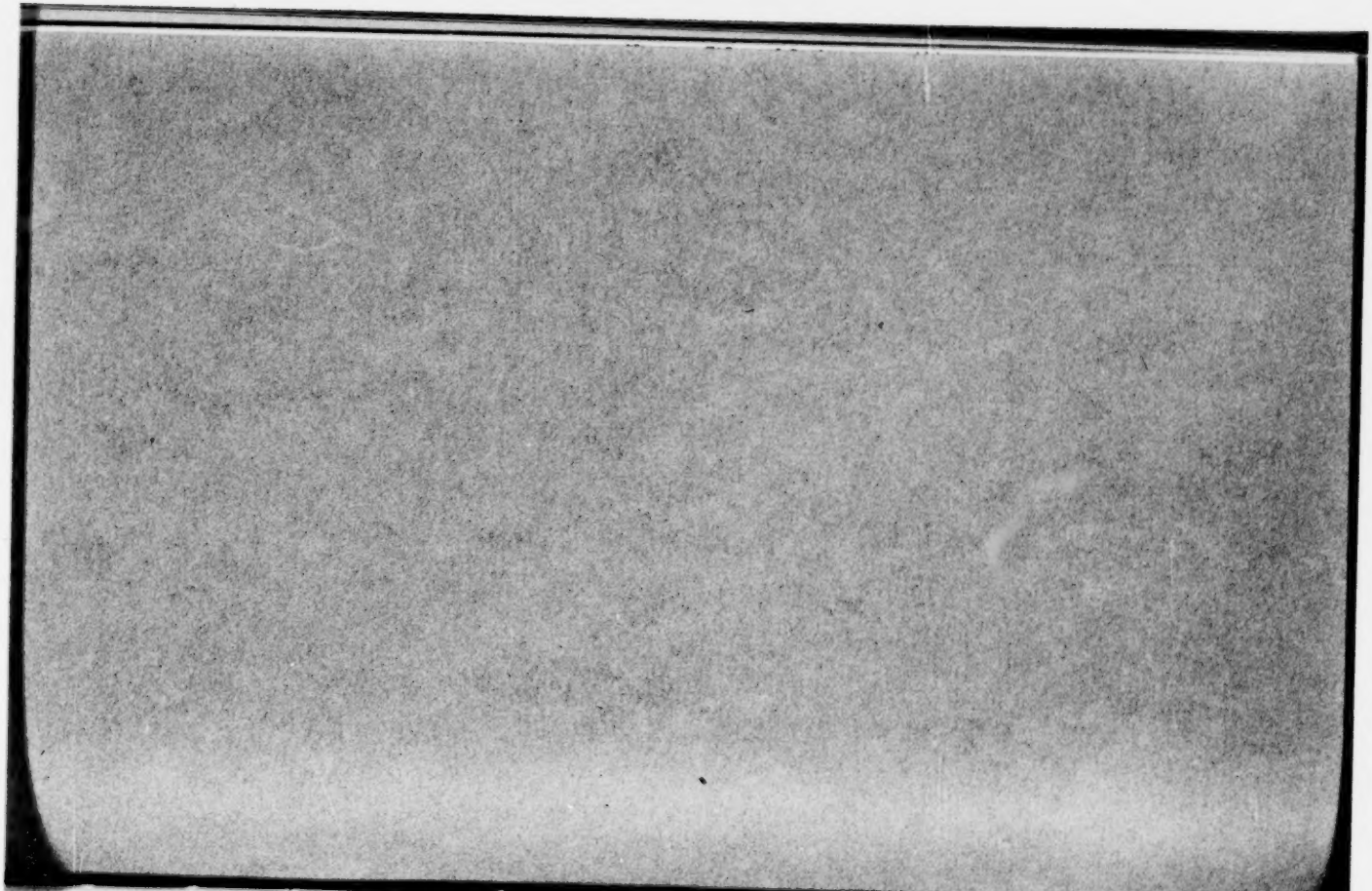
JAS. A. WILLIAMS,
Solicitor for Appellees.
Samuel Herrick
ROBERT J. DANSON,
ROBERT W. DANSON,
Of Counsel.

UNION PRINTING COMPANY, SPOKANE



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CITIZENS SAVINGS BANK & TRUST COMPANY,

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Appellees.

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

STATEMENT.

The mortgagors, J. W. Hays and wife, resided at Spokane, Washington. M. L. Bevis, in whose favor the note and mortgage in controversy were executed, and Bevis Brothers, were engaged in the farm mortgage loan business and resided at Spokane, Washington. (Record 29.) Appellant is a citizen

of the State of Vermont. The method in which M. L. Bevis and Bevis Brothers handled notes and mortgages was as follows:

> "When we took them we sometimes knew to whom we would sell them, and sometimes not. We had some money to carry on our business, but we usually kept it pretty well invested. We always had a good bank account. When we took a mortgage—got a mortgage and note—we would offer it for sale to three or four and sometimes half a dozen parties or persons. That could be done either by telegram or letter. When I took this mortgage and note and application I did not know then whether the Citizens Savings Bank & Trust Company would buy it of us or not." (Record 30.)

Appellant's method of doing business with M. L. Bevis and Bevis Brothers was as follows:

> "* * * we would buy securities that were offered us and which appealed to us as being good investments * * * We had arrangements with Bevis that if, after we bought a loan we found it unsatisfactory he would repurchase. So far as our dealings with Bevis were concerned he would make his investments and would send us on the application, and if we saw fit to take it we would wire him, or write him." (Record 28.)

On September 3, 1908, Mr. Hays signed an application to Bevis Brothers for a loan on the property involved in this action. "The loan was made about September 3d." (Record 29, 30.)

It is apparent that the written application for the loan, taken by Bevis Brothers was for the purpose only of furnishing information to the one who might subsequently buy the note and mortgage, since it appears that Bevis was fully advised as to the value of the land, and it was not necessary for him to make an inspection for the purpose of determining whether he would, or would not, make the loan. It was no doubt due to these facts that the making of the application and the note and mortgage were concurrent acts. From the testimony of J. W. Hays it would appear that the mortgagors knew no one in the transaction but Bevis, and were looking solely for the performance of the engagement of the parties to M. L. Bevis and Bevis Brothers. It does not appear that the Hays had any knowledge as to the method by which M. L. Bevis and Bevis Brothers transacted their business. (Record 31.)

From the standpoint of M. L. Bevis, his engagement with Hays was to loan him money, on the security of the note and mortgage. Hays did not know whether Bevis, or Bevis Brothers, would hold the note and mortgage or would sell them. At that time Bevis did not know whether appellant would buy the note and mortgage. The money paid Hays for the note and mortgage came out of Bevis Brothers' general bank account.

> "When we took the note and mortgage we handled it as we saw fit and there was no agreement between us and Mr. Hays that the payment to him was to be depent on whether we sold it, or did not sell it." (Record 30, 31.)

At the time the note and mortgage were delivered, Bevis Brothers were indebted to appellant in the sum of $1300, due to the fact that they had previously sold appellant a mortgage, with which appellant later became dissatisfied and required Bevis Brothers to take it up, under the arrangement that existed between the parties. (Record 28.)

There are some statements in appellant's brief which are not supported by the record. The record does not disclose that Bevis or Bevis Brothers were "engaged in loaning other peoples' money" (Brief 4); nor does the record show that appellant's directors "approved the loan" (Brief 6) on September 3rd, or at any other time. From the record it does appear, inferentially, that appellant's directors at some time approved the purchase made by its officers of the note and mortgage from Bevis Brothers. (Record 27.)

The statement (Brief 7) that on September 19, 1917, Quincy D. Chapman "entered into an extension and *assumption* agreement with appellant," is erroneous. The record does show that the parties entered into an extension agreement, but there is in this document no agreement on the part of Chap-

man, assuming or agreeing to pay the mortgage debt. The pertinent language bearing on this point is the following:

> "That the said J. W. Hays and Lillie G. Hays, his wife, remain liable and bound by the said note and mortgage in all the respective terms and provisions."

The above quoted portion of the extension agreement, Hays and wife being parties thereto, negatives any intention that Chapman was to be personally liable for the debt. If Chapman assumed and agreed to pay this mortgage debt, then as between the parties, Chapman would be primarily liable and Hays would only be secondary liable.

ARGUMENT.

Appellant, for the purpose of sustaining the jurisdiction of the District Court (Brief 17) suggests that the jurisdiction can be sustained on the theory that this was a law action brought on the extension agreement signed by Chapman. If this theory could be sustained, then the action is one at law and not in equity, and the finding of the District Court on all questions of fact is final, if there was any evidence to support the judgment. Dooley v. Pease 180 U. S. 126; City of St. Louis v. Rutz 138 U. S. 226; Runkle v. Burham 153 U. S. 216. Viewed, however, from the standpoint of being an action in equity, which in fact it is, the judgment will not be disturbed un-

less the findings necessary to support the judgment are manifestly erroneous, or manifestly against the weight of the evidence. Hyman v. Trow Directory Printing Co. 261 Fed. (2nd Cir.) 991; Alexander v. Redmond 180 Fed. (2nd Cir.) 92; Weld v. McKay 218 Fed. (7th Cir.) 807; Harper v. Taylor 193 Fed. (8th Cir.) 944; Waterloo Mining Co. v. Doe 82 Fed. (9th Cir.) 45.

In entering the judgment, from which the appeal is prosecuted, the District Court necessarily was required to pass upon the issues of fact: (1) Were the note and mortgage delivered by Hays to Bevis, or Bevis Brothers, as the agent of appellant in the transaction; (2) were the note and mortgage delivered by Hays to Bevis, or Bevis Brothers, as the agent of said Hays for the purpose of having Bevis, or Bevis Brothers, as the agent of Hays and wife, find someone to loan Hays and wife money on the security of such note and mortgage: (3) assuming there was any such issue in the case, and the action could be regarded as one at law, brought on the extension agreement of date September 19, 1917, did Chapman, by the said agreement, assume and agree to pay the mortgage debt. On this question any inferences to be drawn would a question of fact for the District Court.

DIVERSITY OF CITIZENSHIP.

There being no diversity of citizenship between the mortgagors and the mortgagee, M. L. Bevis, under Section 24 of the Judicial Code of 1911 (Sec. 991 U. S. Comp. Stats.) the District Court was without jurisdiction to entertain the bill filed by appellant as assignee of the note and mortgage, unless the facts brought the case within some recognized exception.

Parker v. Ormsby, 141 U. S. 81.

Kolze v. Hoadley, 200 U. S. 76.

The presumption is against jurisdiction.

Commercial Trust Company v. Laurens County, 267 Fed. 901 (903).

Apparently, it is appellant's contention that jurisdiction existed on the theory that Bevis when he received the note and mortgage, acquired no beneficial interest in same, and was solely an agent of the mortgagors, Hays, for the purpose of borrowing money for Hays on the faith and security of such note and mortgage. The record, however, furnishes no support for such a contention. Neither Bevis or Hays testified that there was any such arrangement, or that there was any understanding that Bevis was to be under no obligation to personally

advance the money called for by the note and mortgage. Nor did either testify that there was any understanding that the payment of the money from Bevis was to be at all contingent upon Bevis finding a purchaser for the note and mortgage. Bevis testified as follows:

> "We did not have any arrangement with Mr. Hays that we were going to sell the mortgage and note * * * and there was no agreement between us and Mr. Hays that the payment to him was to be dependent upon whether we sold it or did not sell it." (Record 30-31.)

It is manifest from this testimony that the relation between Hays and Bevis upon the execution and delivery of the note and mortgage was that of creditor and debtor; Bevis became a debtor to Hays for the amount of the note and mortgage. Due to the uncertainty as to whether the mortgage would be found to be a first lien on the premises in question, the money was temporarily withheld.

> "* * * we probably wanted a few days to satisfy ourselves in regard to the title before we would pay out all of the money. There might have been some prior loan or judgment or taxes or something of that kind." (Record 31.)

There is nothing in the record which negatives the idea that the transaction was a closed one at the time the note and mortgage were delivered. Nothing remained to be done by Bevis but to pay.

A right of action, for the amount represented by the note, existed in favor of Hays and against Bevis, provided payment was not made, and this was not contingent in any respect upon whether Bevis was able to sell the note and mortgage to others.

In the case of Holmes v. Goldsmith, 147 U. S. 150, the note was an accommodation one in favor of the payee. The purpose was to enable the payee to raise money for himself, by selling the note with his endorsement. There was, therefore, never any indebtedness between the makers of the note and the payee. In Commercial Trust Company v. Laurens County, 267 Fed. 901; Kiven v. Virginia-Carolina Chemical Company, 145 Fed. 288, and Baltimore Trust Company v. Screven County, 238 Fed. 834, the notes were made payable to the payee therein named in order to permit such payee to act as agent for the maker in selling the notes and acquiring funds for the maker. There was, therefore, no indebtedness at any time from the maker to the payee, but the only indebtedness that ever existed was that of the maker in favor of the endorsees.

Under the uncontroverted facts, this case does not fall within the rule of any of the cases above mentioned, which have been cited by appellant. There is nothing in the record here that would support an inference, much less a finding, that Bevis was the agent of Hays to negotiate a sale of the note and mortgage, or that the relationship of debtor and

creditor did not exist between the parties. However, even if there was any evidence in this record, which would justify an inference that the relationship between Hays and Bevis was that of principal and agent, or that Bevis upon receipt of the note and mortgage did not become indebted to Hays for the amount thereof, nevertheless the question of fact, if an inference could be indulged, which would sustain the jurisdiction, has been decided by the District Court adversely to appellant.

The quotation from the application, Exhibit 4, found at page 10 of appellant's brief, does not aid appellant. The use of the words "and in the negotiation of the loan" apparently mean that Hays would pay all expenses in the event Bevis should conclude not to take the loan for any reason, if the security offered should not be as represented, or if Hays should later refuse to complete the loan. It is the stereotyped provision, which is generally found in printed applications for farm loans, certain portions not being of importance in this particular transaction since apparently Bevis had already agreed to make the loan and was already familiar with the security offered, and Hays had already accepted the loan, as evidenced by the execution at the same time of the note and mortgage. In this particular case the language quoted, as it appears in the application, would only be material in the event it should be later found that the mortgage did not create a first lien on the land.

The case of Page v. Town of Rochester, 137 Fed. 663, did not arise on the assignment of a right of action at all. It is said:

> "Williams' cause of action does not depend upon the assignment of a chose in action to him, but upon the assignment of a right to him, by which performance he acquired a chose in action to himself."

Other cases cited by appellant, we believe, require no notice. It is of course elementary that a principal may confer authority upon an agent to make a contract binding the principal, and it is also a well recognized principle that where there are conditions precedent to an obligation accruing against one party to a contract, a right of action does not arise until the conditions are performed. In this case had Bevis retained title to the mortgage papers, but failed to pay therefor, and later sued to recover on the note and mortgage, Hays could have defended by showing that the consideration had failed, due to Bevis failing to advance the money for the note and mortgage. In other words, the failure of Bevis to perform the conditions of his contract, when the time came for performance, would constitute a defense. Hays, however, would not have been limited to making this defense in an action brought by Bevis. He would have had a right of action against Bevis for the amount Bevis was to advance in consideration of the note and mortgage, which had already been delivered.

EFFECT OF EXTENSION AGREEMENT.

Appellant suggests (Brief 17) without any argument, that jurisdiction might be sustained on the extension agreement since that document was signed by Quincy D. Chapman and appellant. It is not claimed, however, that there was in this extension agreement any provision obligating Chapman to pay the mortgage debt. Unless there was in this extension agreement some provision creating an indebtedness from Chapman to appellant, then it would seem manifest that this could not be considered an action brought upon such extension agreement, and no relief could be given founded upon such agreement. The only importance of that document in this cause, is its bearing upon the question as to whether the statute of limitations had run. There is, however, no issue here as to the statute of limitations.

It will be observed that by the amended bill it is alleged that the mortgagors Hays executed two deeds to Chapman, and that the deeds contained provisions that Chapman assumed and agreed to pay the mortgage debt. (Par. 5 and 6, Record 16, 17.) These allegations in the bill are denied in the answer. (Record 23.) The purported deeds on which complainant relied to establish these allegations of the bill were not included in the praecipe for the record on appeal, nor are they attached to the record certified to this court, nor were the let-

ters written at the time of the purported deeds from Hays to Chapman showing that the deeds were in fact but mortgages, and that the deeds were not at any time exhibited to Chapman, included in the record certified to this Court. Appellant, therefore, apparently is not relying upon the said purported deeds in which, so appellant claims, there were assumption agreements. However, if appellant was relying upon such deeds, any assumption agreement therein contained would not vest jurisdiction in the District Court on the theory of a diversity of citizenship. The purported deeds were from Hays and wife, citizens of the State of Washington, to Chapman, likewise a citizen of the State of Washington. The right, if any, of appellant, to obtain any relief, based upon any such alleged assumption agreement would be simply an equity in the nature of subrogation to have applied upon the debt of the mortgagors, any amount which, under the purported assumption agreement contained in such deeds, should have been paid by the grantee. The doctrine, on which relief will be afforded a mortgagee, in such a case, is for the protection of the grantor in the deed, and not for the protection of the grantor's creditors. Opie v. Pacific Investment Company, 26 Wash. 505, 513-516; Keller v. Ashford, 133 U. S. 610; Union Mutual Life Insurance Company v. Hanford, 143 U. S. 187. The appellant would be merely an equitable assignee of the grantors in the deeds. American Water Works & Guaranty Company v. Home Water Company, 115 Fed. 171, 176.

Whether complainant's remedy against Chapman, assuming there was any such assumption agreement in the deeds, would be at law or in equity, would be controlled by the law of the place where the suit was brought. Union Mutual Life Insurance Company v. Hanford, *Supra;* Willard v. Wood, 135 U. S. 309.

If appellant is contending that the District Court had jurisdiction of this cause, on the theory that the action was brought on the extension agreement of September 19, 1917, to which agreement the mortgagors Hays, appellant, and Chapman were all parties, it would seem manifest that such contention is without merit. Apparently this theory was not advanced in the District Court, since in the memorandum opinion of the District Judge it appears that the contention there made was that jurisdiction might be sustained under the alleged assumption agreement contained in the deeds. (Record 49.) The claim presented by appellant to the executor, and which was a prerequisite to the institution of this action against the executor, was founded apparently on the theory that the indebtedness was a note and mortgage. The gravamen of the amended bill is the note and mortgage. Otherwise the note would be of no importance, except for the purpose of fixing the amount of the debt; the mortgage would be of no importance whatever and respondents Millard F. Chapman and Mrs. H. Ferry would not be proper

parties to the action at all, since neither signed the extension agreement. It will be further observed that the relief demanded is on the theory that the action is on the note and mortgage since it is sought to have the mortgage foreclosed, the property sold and rspondents Millard F. Chapman and Mrs. H. Ferry, as well as respondent Sexton, executor, barred and foreclosed as to any rights in the real estate covered by the mortgage.

If it could be said that the gravamen of this action was the extension agreement, and the necessary diversity of citizenship existed as between appellant and Chapman, nevertheless the right of action against respondents Millard F. Chapman and Mrs. H. Ferry necessarily would be upon the note and mortgage, since they were not in any manner parties to the extension agreement, nor obligated thereunder, and jurisdiction could not be sustained as to them. However, when the said extension agreement is examined it appears therefrom that Quincy D. Chapman, by executing that document, did not become personally obligated to appellant, or any other person. The language of the document discloses no intention on the part of Quincy D. Chapman to assume the payment of the mortgage debt. In fact the language negatives the idea of any personal indebtedness, since it is there provided that the "said J. W. Hays and Lillie G. Hays remain liable and bound by the said note and mortgage" in all the respective terms and provisions.

The only provision in the document on which appellant might attempt to argue that Quincy D. Chapman obligated himself to pay the debt is the following:

> "* * * and it is further agreed by all the parties hereto, that all the other terms, provisions and conditions of the said note and mortgage in and all hereto shall be binding and obligatory upon the respective parties hereto, and upon the said land described herein and the said mortgage shall remain a lien upon said lands in all particulars and be of the same force and effect as if the time of payment of the said note and mortgage were originally made payable on the first day of January, 1923, instead of on the first day of January, 1918 * * *" (Record 8).

It will be observed, that in the above quoted portion, there is no language indicating that Quincy D. Chapman was obligating himself to pay the mortgage debt. The provision is simply the usual one for the purpose of making clear that none of the terms or provisions of the original document are changed by the extension agreement, except the date of payment. In other words, instead of the mortgage being due and payable on January 1, 1918, such due date should be January 1, 1923, which would operate to protect the owner of the property against a prior foreclosure, and the mortgagee against the statute of limitations commencing to run until that date. Except with the change of date, the note and mortgage were binding and obligatory as therein provided, as of the date they were executed.

The burden of proving that Quincy D. Chapman entered into an agreement with appellant whereby he assumed and agreed to pay the mortgage debt was on complainant.

The fact that the land was conveyed to Quincy D. Chapman, subsequent to the giving of the mortgage, raises no inference that he at any time obligated himself to pay the mortgage debt. Whether this question is considered from the standpoint of an assumption of mortgage provision in a deed of conveyance, or of an assumption agreement in a separate instrument between the grantee of the mortgagor and the mortgagee, in order to hold the grantee for the mortgage debt, the intent to assume the mortgage must appear clear from the language used and can not be established by inferences. Pingrey on Mortgages, (1893 Ed.) Sec. 1020; Jones on Mortgages (7th Ed.) Sec. 748; Ordway v. Downey 18 Wash. 412. The liability would still be the indebtedness secured by the mortgage. Roberts v. Fitzalen, 52 Pac. (Calif.) 818. In effect the grantee would be substituted for the maker of the note. Since the right of action would be still on the note and mortgage, the grantee being simply substituted for the original mortgagor, the assumption agreement between citizens of different states would not create a diversity of citizenship, where it did not exist before.

If this extension agreement, assuming jurisdiction could be based thereon, could be aided by extrinsic evidence, or by inferences to be drawn fr such document, the District Court, in determining the jurisdictional question, necessarily had to determine whether Quincy D. Chapman had, or had not, by executing the extension agreement, obligated himself to appellant for the payment of the mortgage debt. The findings of the District Court, upon this question of fact, would not be subject to review, if the action is treated as one at law, if there is any evidence upon which the finding could be made. Or, if the cause is treated as one in equity, the finding of the District Court would not be held erroneous, unless manifestly against the weight of the evidence.

We submit that the District Court was without jurisdiction as to each and all of the respondents and that the judgment dismissing the action should be affirmed.

Respectfully submitted,

JAS. A. WILLIAMS,
Solicitor for Appellees.

ROBERT J. DANSON,
ROBERT W. DANSON,
Of Counsel.

be granted.

Judgment affirmed.

CITIZENS SAVINGS BANK & TRUST COMPANY *v.* SEXTON, EXECUTOR OF CHAPMAN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

No. 261. Argued February 25, 1924.—Decided March 17, 1924.

1. Where the parties to a note and mortgage are citizens of the same State, jurisdiction to collect the note by foreclosure of the mortgage

and deficiency judgment does not exist in the District Court through diversity of citizenship, if one of the defendants is a citizen of that State and the plaintiff, although of another State, acquired the obligations by assignment from the original obligee. Jud. Code, § 24. P. 312.

2. While this restriction does not apply to a plaintiff who, although nominally the assignee, was really the payee, the evidence in the present case fails to sustain the allegation that the payee named in the note acted as the maker's broker in securing the loan from the plaintiff and that the plaintiff was at all times the beneficial owner of the paper. P. 313.
3. The rule that the restriction of Jud. Code, § 24, does not prevent a suit by the assignee on a new and subsequent agreement is inapplicable where the suit is for foreclosure of a mortgage and the relief sought by a deficiency judgment, against a purchaser of the property who assumed its payment, is merely ancillary and incidental to the primary purpose of the bill. *Id.*

Affirmed.

APPEAL from a decree of the District Court dismissing, for want of jurisdiction, a suit on a promissory note and mortgage.

Mr. Lawrence H. Brown, with whom *Mr. Frederick W. Dewart* was on the brief, for appellant.

Mr. James A. Williams, with whom *Mr. Samuel Herrick*, *Mr. Robert J. Danson* and *Mr. Robert W. Danson* were on the brief, for appellees.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is an appeal under § 238 of the Judicial Code from a decree dismissing a suit in equity for want of jurisdiction. The question certified for decision arises under the provision in § 24 of the Judicial Code that, "No district court shall have cognizance of any suit . . . to recover upon any promissory note or other chose in action in favor of any assignee . . . unless such suit might

have been prosecuted in such court . . . if no assignment had been made."[1]

The appellant, a citizen of Vermont, brought suit in the Eastern District of Washington, to recover on a promissory note for $5,000 and to foreclose a mortgage on land in the latter State given to secure it. The makers and the payee of the note are citizens of Washington. The note and mortgage were assigned and transferred by the payee to the plaintiff for a valuable consideration. The mortgaged land was thereafter conveyed by the makers of the note to a citizen of Washington, who, it is alleged, in consideration of a subsequent extension of the mortgage by the plaintiff expressly assumed its payment. The purchaser thereafter died. The defendants are the executor of his will, a citizen of Washington, and the devisees, citizens of Michigan and Ohio. A deficiency judgment is prayed against the executor if the proceeds of the foreclosure prove insufficient to pay the debt. Neither the makers nor the payee of the note are sued.

We conclude that the suit was rightly dismissed for want of jurisdiction.

1. Jurisdiction was invoked solely on the ground of diversity of citizenship. However the plaintiff's assignor, the payee of the note, being a citizen of Washington, could not have proceeded in the District Court against another citizen of the same State; and hence, under the restriction in § 24 of the Code, nothing else appearing, the court had no jurisdiction of the suit brought by the plaintiff as assignee. *Gibson* v. *Chew*, 16 Pet. 315, 316; *Kolze* v. *Hoadley*, 200 U. S. 76, 83, and cases cited.

[1] This restriction upon the jurisdiction of the lower federal courts has been in force, with some changes not here material, since the Judiciary Act of 1789. The prior statutes, except § 629 of the Revised Statutes, are set forth in *New Orleans* v. *Quinlan*, 173 U. S. 191, 192. Decisions under them as well as under the Code provision are cited in this opinion without distinction in this respect.

2. If, however, it is shown, upon allegation and proof, that the relation of the parties to a note is otherwise than appears from its terms, and that the plaintiff, although apparently assignee, is in reality the payee, the Code provision does not apply and his right to invoke the jurisdiction of the District Court is not restricted by the fact that the suit could not have been prosecuted by the nominal payee. *Holmes* v. *Goldsmith,* 147 U. S. 150, 159. Such is the case where the nominal payee was merely the agent of the maker for the purpose of negotiating the note and had no beneficial interest therein or right of action thereon. *Blair* v. *Chicago,* 201 U. S. 400, 448; *Kirven* v. *Chemical Co.* (C. C. A.) 145 Fed. 288, 290; *Wachusett Bank* v. *Stove Works* (C. C.) 56 Fed. 321, 323; *Baltimore Trust Co.* v. *Screven County* (D. C.) 238 Fed. 834, 836; *Commercial Trust Co.* v. *Laurens County* (D. C.) 267 Fed. 901, 903.

To bring the suit within this exception the plaintiff alleged that in taking and assigning the note and mortgage, the payee acted as the mere broker and agent of the makers in procuring a loan from the plaintiff and neither became their creditor nor acquired any beneficial interest in the note or mortgage; but that the plaintiff was at all times the beneficial owner. The defendants denied these allegations. These issues of fact were tried by the District Judge, on evidence taken before him, from which he found that the payee, a member of a firm engaged in the mortgage loan business, did not act as agent for the makers, but for his firm, as independent dealers, and acquired the note and mortgage and afterwards sold them to the plaintiff as in "the ordinary case where a person purchases property for resale."

An examination of the evidence discloses no error in this finding; on the contrary it accords with the greater weight of the testimony.

3. It is urged that as the plaintiff seeks a deficiency judgment against the executor on the ground that his